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Supreme Court, U.S.

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**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1989

No.

SAMUEL S. GRANITO,

PETITIONER

v.

UNITED STATES,

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

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QUESTIONS PRESENTED

- I. Whether the petitioner's RICO convictions must be reversed when one of the three predicate acts charged against him was supported by insufficient evidence, and the jury's general RICO verdict makes it impossible to determine whether the jury relied upon the insufficient predicate act in finding that the government had proven the "pattern of racketeering activity" element of RICO.

- II. Whether the "pattern of racketeering activity" element of RICO is unconstitutionally vague as applied to the conduct of the petitioner, when the predicate acts alleged in the indictment were not related to each other, but only related to the alleged enterprise.

PARTIES TO THE PROCEEDINGS

In addition to the named parties, Gennaro J. Angiulo, Donato F. Angiulo, Francesco J. Angiulo, and Michele A. Angiulo were also appellants in the United States Court of Appeals for the First Circuit.

TABLE OF CONTENTS

Questions Presented	I
Parties To The Proceedings	II
Table Of Authorities	III
Opinion Below	1
Jurisdiction	1
Constitutional And Statutory Provisions Involved	2
Statement Of The Case	4
Reasons For Granting The Petition	16
Conclusion	30

TABLE OF AUTHORITIES

Cases	Page
<i>Callanan v. United States</i> , 881 F.2d 229 (6th Cir. 1989), <i>cert.</i> <i>denied</i> , ___ U.S. ___, 110 S. Ct. 1816 (1990)	20
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	26
<i>Cramer v. United States</i> , 325 U.S. 1 (1945)	17
<i>Dunn v. United States</i> , 284 U.S. 390 (1932)	20
<i>H.J. Inc. v. Northwestern Bell</i> <i>Telephone Co.</i> , ___ U.S. ___, 109 S. Ct. 2893 (1989)	22, 27, 28
<i>Haupt v. United States</i> , 330 U.S. 631 (1947)	16

<i>In Re Winship</i> , 397 U.S. 358 (1970)	20, 21
<i>Int. Bro. of B.,I.S.,B.,F. & H. v.</i> <i>Hardeman</i> , 401 U.S. 233 (1971)	17
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939)	28
<i>Massachusetts v. Bloomberg</i> , 302 Mass. 349, 19 N.E.2d 62 (1939)	24
<i>McCulloch v. United States</i> , 484 U.S. 947 (1987)	20
<i>McNally v. United States</i> , 483 U.S. 350 (1987)	19
<i>Morissette v. United States</i> , 342 U.S. 246 (1951)	21
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972)	26
<i>Sedima, S.P.R.L. v. Imrex Co.</i> , 473 U.S. 479 (1985)	13, 16, 22, 27
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)	16, 22
<i>United States v. Angiulo</i> , 897 F.2d 1169 (1st Cir. 1990)	1
<i>United States v. Angiulo</i> , 847 F.2d 956 (1st Cir.), <i>cert. denied</i> , ___ U.S. ___, 109 S. Ct. 314 (1988)	29
<i>United States v. Brown</i> , 583 F.2d 659 (3d Cir. 1978), <i>cert.</i> <i>denied</i> , 440 U.S. 909 (1979)	18

<i>United States v. Campanale</i> , 518 F.2d 352 (9th Cir.), <i>cert. denied</i> , 423 U.S. 1050 (1975)	27
<i>United States v. Capone</i> , 683 F.2d 582 (1st Cir. 1982)	20
<i>United States v. Corona</i> , 885 F.2d 766 (11th Cir. 1989), <i>cert.</i> <i>denied</i> , ___ U.S. ___, 110 S. Ct. 1838 (1990)	19, 21
<i>United States v. Elders</i> , 569 F.2d 1020 (7th Cir. 1978)	21
<i>United States v. Holzer</i> , 840 F.2d 1343 (7th Cir.), <i>cert.</i> <i>denied</i> , ___ U.S. ___, 109 S. Ct. 315 (1988)	18
<i>United States v. Jacobs</i> , 475 F.2d 270 (2d Cir.), <i>cert. denied</i> , 414 U.S. 821 (1973)	23
<i>United States v. Kragness</i> , 830 F.2d 842 (8th Cir. 1987), <i>cert.</i> <i>denied</i> , ___ U.S. ___, 109 S. Ct. 2086 (1989)	18
<i>United States v. Krogstad</i> , 576 F.2d 22 (3d Cir. 1978)	21, 24
<i>United States v. Lopez</i> , 803 F.2d 969 (9th Cir. 1986), <i>cert.</i> <i>denied</i> , 481 U.S. 1030 (1987)	19

<i>United States v. Mandel</i> , 862 F.2d 1067 (4th Cir. 1988), <i>cert.</i> <i>denied</i> , ___ U.S. ___, 109 S. Ct. 3190 (1989)	18
<i>United States v. Ochs</i> , 842 F.2d 515 (1st Cir. 1988)	23
<i>United States v. Peacock</i> , 654 F.2d 339 (5th Cir. 1981), <i>vacated</i> <i>in part on other grounds</i> , 686 F.2d 356 (5th Cir. Unit B 1982), <i>cert.</i> <i>denied</i> , 464 U.S. 965 (1983)	19
<i>United States v. Riccobene</i> , 709 F.2d 214 (3d Cir.), <i>cert.</i> <i>denied</i> , 464 U.S. 849 (1983)	26
<i>United States v. Ruggiero</i> , 726 F.2d 913 (2d Cir.), <i>cert. denied</i> , 469 U.S. 831 (1984)	17, 18, 20, 25
<i>United States v. Turkette</i> , 632 F.2d 896 (1st Cir. 1980), <i>rev'd</i> , 452 U.S. 831 (1981)	29
<i>United States v. Van Scoy</i> , 654 F.2d 257 (3d Cir.), <i>cert. denied</i> , 454 U.S. 1126 (1981)	24
<i>United States v. Walgren</i> , 885 F.2d 1417 (9th Cir. 1989)	18
<i>Yates v. United States</i> , 354 U.S. 298 (1957)	16
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	16

Constitution and statutes

U.S. Const. Amend. V	2, 26
18 U.S.C. § 2 (West 1969)	24
18 U.S.C. § 1955 (West 1984)	4
18 U.S.C. § 1961(5) (West 1984)	2
18 U.S.C. § 1962(c) (West 1984)	2
18 U.S.C. § 1962(d) (West Supp. 1990)	3
28 U.S.C. § 1254(1) (West Supp. 1990)	1
Mass. Gen. Laws ch. 265, § 1 (West 1990)	3
Mass. Gen. Laws ch. 274, § 2 (West 1990)	3, 12

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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Samuel S. Granito hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this criminal case.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., 1a-109a) is reported at 897 F.2d 1169 (1st Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 5, 1990. The petitioner filed a timely Petition for Rehearing on March 15, 1990. The Petition for Rehearing was denied by the court on March 26, 1990. 113a. The jurisdiction of this Court is invoked under 28 U.S.C. §

1254(1) (West Supp. 1990).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Title 18 U.S.C. § 1961(5) (West 1984) provides:

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .

* * * * *

Title 18 U.S.C. § 1962(c) and § 1962(d) (West 1984 & Supp. 1990) provide:

(c) It shall be unlawful for any

person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

* * * * *

Massachusetts General Laws Annotated Chapter 274, § 2 (West 1990) provides:

Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.

* * * * *

Massachusetts General Laws Annotated Chapter 265, § 1 (West 1990) provides:

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be murder in the first degree is murder in the second degree. . . . The degree of murder shall be found by

the jury.

STATEMENT OF THE CASE

On September 19, 1983, a grand jury sitting in the District of Massachusetts returned a lengthy, 20-count indictment against seven defendants, including the petitioner Samuel S. Granito. Granito was named in three counts of the indictment, charging him with conspiring to violate the RICO statute (Count 1); a substantive violation of the RICO statute (Count 2); and conducting an illegal gambling business prohibited by state law in violation of 18 U.S.C. § 1955 (West 1984)(Count 4). A total of three predicate acts were charged against Granito in the RICO counts. Two paragraphs (a-8 and a-9) accused him, respectively, of conspiring to murder Angelo Patrizzi and with being an accessory before the fact to the murder of Patrizzi by Frederick Simone and others. The substantive gambling offense charged against Granito was also enumerated as a RICO predicate act (b-2). The indictment alleged that Granito and the other defendants were members of the Patriarca family of La Cosa Nostra.

Prior to trial, the petitioner Granito moved to dismiss the RICO counts because the pattern of racketeering activity element of the statute was unconstitutionally vague, as applied to his conduct. The trial court denied the motion to dismiss. 110a-111a.

Trial commenced on July 10, 1985. A substantial portion of the government's evidence consisted of tape-recorded fruits of electronic surveillance. All of the tapes proffered by the government were introduced into evidence and played to the jury, accompanied by government-

created transcripts which purported to identify the individual speakers as well as their putative words. During the entire four-month period of electronic surveillance, petitioner Granito was allegedly overheard on only two occasions.

The government's theory respecting the murder of Angelo Patrizzi, as presented at trial, was initially set forth in its opening statement. Tr. 1-71-78. According to the prosecution, Samuel Granito and Frederick Simone met with Gennaro Angiulo at 98 Prince Street in Boston on March 11, 1981 and discussed their prior, unsuccessful attempts to kill Patrizzi. Tr. 1-72-74.^{1/} According to the government, Gennaro Angiulo and Ilario Zannino subsequently assumed responsibility for murdering Patrizzi.^{2/} Without specifically identifying the alleged killer, the government asserted in its opening that "Angelo Patrizzi was ... clipped or murdered at the direction of Gennaro Angiulo and Ilario Zannino." Tr. 1-78.

The government introduced four tape recordings concerning the murder of Angelo Patrizzi. The first tape (#309) allegedly contained a conversation intercepted at 98 Prince Street on March 11, 1981 at 7:55 p.m. Tr. 4-66. According to the government, Gennaro Angiulo, Samuel Granito, and Frederick Simone were participants in that

^{1/} Simone was identified as an unindicted co-conspirator. Gennaro Angiulo was a co-defendant.

^{2/} Ilario Zannino was initially a co-defendant. The case against him was severed early in the trial due to Zannino's ill health.

conversation. Viewed in the light most favorable to the government, the conversation contains a description by Granito and Simone of several unsuccessful attempts to murder Patrizzi. All they have managed to achieve is a phone number in South Boston which may provide a means of learning Patrizzi's whereabouts. At the conclusion of the conversation, Gennaro Angiulo asks Granito or Simone to give him that telephone number. Granito says that he is leaving town to "take a rest." Tape #309 was the sole recording concerning Angelo Patrizzi introduced by the government at trial on which Granito allegedly appeared. —

The second relevant tape (#322) was allegedly recorded at 98 Prince Street on March 12, 1981 at 5:35 p.m. Tr. 41-100. The government claims that Gennaro Angiulo, Ilario Zannino, and an unknown male were present during that conversation. Examined in the light most favorable to the government's theory, this conversation reflects a determination by Gennaro Angiulo that he and Zannino will now assume the direct responsibility for the murder of Angelo Patrizzi. Angiulo describes his conversation with Granito and Simone the previous evening. According to the government's transcript, Angiulo and Zannino discuss several possible scenarios for murdering Patrizzi. None of these plans involves Granito, who is referred to in the following terms:

Sammy says ... "why you know I ... old guy."

"Sammy, ... forget about it. We don't want to know about old guys. We want to find out about new guys."

Gov. Trans. (#322), p. 1. Moreover, none of the potential scenarios discussed during this conversation suggests that Frederick Simone would play any part in the murder of Angelo Patrizzi.

The third tape introduced by the government regarding Angelo Patrizzi was allegedly recorded at 98 Prince Street on March 12, 1981 at 6:23 p.m. (#323). The government alleges that Gennaro Angiulo and Ilario Zannino participated in this brief conversation regarding "the number." Viewing this evidence in the light most favorable to the government's theory, it constituted a follow-up to the earlier conversation respecting a phone number in South Boston which might provide insight into the location of Angelo Patrizzi. The conversation is devoid of any reference to Granito, Simone, or any other specific person.

The final tape introduced by the government about Angelo Patrizzi (#11-M(ix)) was allegedly recorded at 51 North Margin Street in Boston on April 3, 1981 at 3:53 a.m. According to the government, Ilario Zannino, John Cincotti, and Ralph Lamattina participated in the relevant portion of the conversation.^{3/} Taken in the light most favorable to the government, the conversation includes Zannino's recounting of what he has been told about Patrizzi's murder. The government's transcript of the conversation attributes the following excerpt to Zannino:

^{3/} Cincotti and Lamattina were named as unindicted co-conspirators.

Nine of them. Nine of them. They lugged him from the fuckin' Topcoat. Nine fuckin' guys.

* * *

But that's alright. They did, John. He went in for a topcoat. And nine of them did it. Sonny did. Sonny Boy. You know all the fuckin' camurist (troublemakers). And he's in his trunk.

Gov. Trans., p. 2.

The government presented evidence that the body of Angelo Patrizzi was found in the trunk of a stolen automobile in Lynn, Massachusetts on June 11, 1981.^{4/} Tr. 39-20. Dr. George Katsas, the medical examiner who conducted an autopsy of the body, testified that the cause of death was strangulation. Dr. Katsas was unable to specify the time of death, but stated that Patrizzi had been dead "at least a couple of weeks" when his body was discovered. Tr. 40-62-63. Roland Walton, an automobile dealer, testified that he discovered the vehicle in which Patrizzi's body was found missing from his lot in June 1981. He stated that he would likely have known on May 15, 1981 that the vehicle was missing if it had been taken before that date. Tr. 40-113.

The government presented evidence that Angelo Patrizzi had resided at the Brooke House, a halfway house in Boston, from January 26, 1981 until he escaped on

^{4/} The parties stipulated that the body found was, in fact, Angelo Patrizzi. Tr. 42-147.

March 3, 1981. Tr. 41-34. Patrizzi was employed by Surf Auto Body in Revere during that period. Tr. 41-16. Jean Lampron testified that Patrizzi stayed with her family in South Boston on a frequent basis in February and March 1981. She last saw him on or about March 15, 1981. Tr. 41-67. Martin Coleman, a Boston police officer, testified that he conducted physical surveillance of Surf Auto Body during 1981. He observed Samuel Granito and Frederick Simone there on a frequent basis during the winter, spring and summer of 1981. Tr. 42-67, 42-70. There was no testimony that either Granito or Simone met with Angelo Patrizzi at Surf Auto Body while Patrizzi was employed.

Coleman testified that no one was present at Surf Auto Body during a period lasting approximately ten days in mid-March 1981. Tr. 42-62-63. He also stated that Granito went on a trip to Europe during April 1981. Tr. 42-137. It was the government's theory that Granito planned to go to Florida shortly after meeting with Gennaro Angiulo on March 11, 1981. Tr. 122-96. No testimony was offered specifically placing Granito or Frederick Simone in Massachusetts anytime between March 11, 1981 and the discovery of Angelo Patrizzi's body three months later.

There was no other probative evidence about how the murder of Angelo Patrizzi was carried out or the identity of the person or persons responsible for his death. The FBI case agent, Edward Quinn, testified that "I am not sure that that murder has been solved." Tr. 97-109. Indeed, the only evidence arguably shedding any light upon what actually happened to Patrizzi was Tape-record-

ing 11-M(ix), described above. None of the alleged participants in that conversation, Zannino, Cincotti, or Lamattina, was a defendant or witness at the trial of this case.

In its closing argument, the government made no specific contention as to who actually killed Angelo Patrizzi. See Tr. 123-29-43, 126.

With respect to the gambling count against Granito, the government relied upon one tape-recording and the testimony interpreting that conversation by the government's gambling expert, FBI Special Agent Arthur Eberhart. Eberhart testified that most of a tape-recorded conversation on the evening of March 11, 1981 between Gennaro Angiulo and Samuel Granito consisted of a report by Angiulo to Granito about the activities of an unindicted individual, Nicolo Giso. Tr. 83-78. Eberhart admitted that most of the statements on that tape attributed to Granito related to past gambling activities, rather than to an ongoing poker game at North Margin Street. Tr. 83-73. Nevertheless, Eberhart stated his opinion that Granito asked Gennaro Angiulo for his portion of the proceeds from the North Margin Street game during the course of the tape-recorded conversation. Tr. 85-19-20. Based upon that conversation, Eberhart testified that, in his opinion, Granito was a "partner" in the poker game. Tr. 83-55.

Over petitioner's objection, the government presented the testimony of its putative organized crime expert, FBI Special Agent James Nelson, regarding the structure of the alleged enterprise and the roles played by

particular defendants. Nelson testified that on the basis of his experience and knowledge and his analysis of the tape recordings, it was his opinion that Samuel Granito was "*capo regime* in the Boston family of LCN." Tr. 33-60.

While the government presented substantial evidence at trial respecting the existence of a criminal organization, there was no evidence demonstrating any cognizable relationship between the murder of Angelo Patrizzi and the operation of the North Margin Street poker game, the substantive predicate acts charged against Granito. There was no suggestion that Patrizzi had been murdered as a result of anything relating to the poker game, or that the operation of the poker game was enhanced or affected in any fashion by Patrizzi's murder. In effect, the government asked the jury to find beyond a reasonable doubt that these alleged acts were part of a "pattern" based simply on the contention that they were both carried out under aegis of the overall criminal enterprise described in the indictment.

Before the district court charged the jury, an extended charge conference with counsel was held. Counsel for Granito argued that Predicate Act a-9 (accessory to the murder of Angelo Patrizzi) should be stricken on grounds of insufficient evidence. Tr. 127-3. The trial court refused to strike Predicate Act a-9.

In instructing the jury about the charges against Granito relating to the murder of Angelo Patrizzi, the trial court read both predicate acts (a-8 and a-9) aloud. Tr. 127-122. After defining the offense of murder under Massachusetts law, Tr. 127-123-125, the trial court turned

to the two specific offenses alleged -- conspiracy to murder and accessory before the fact of murder. Instructing the jury on Predicate Act a-9, charging accessory before the fact, the trial court read the relevant Massachusetts statute, Mass. Gen. Laws ch. 274, § 2. Tr. 127-125-126.

The instruction then continued as follows:

To find either of the defendants [Gennaro Angiulo or Samuel Granito] guilty of this offense beyond a reasonable doubt you must find first that Frederick Simone committed or was otherwise a principal in the commission of the murder of Angelo Patrizzi. You must then find that the defendant under your consideration counseled, hired, or otherwise procured this murder by intentionally assisting Simone in the commission of the crime or significantly participated in its preparation. And you must find that the defendant did this while sharing with Simone the mental state required for that crime, that is malice aforethought.

Tr. 127-126.

In instructing the jury about the RICO counts, the trial court stated that the government had to prove that a particular defendant had participated or agreed to participate in conducting the affairs of an enterprise through a pattern of racketeering activity. "Pattern" was defined as acts which were "... connected to each other by some common scheme, plan, or motive and were of sufficient number such that you find that they constituted a planned ongoing continuing crime, in other words, a pattern as opposed to sporadic, unrelated, isolated criminal epi-

sodes." Tr. 127-108, 118, 117. Granito's counsel objected to this pattern instruction. Tr. 127-136.

Granito requested the trial court to instruct the jury, that "while two [racketeering] acts are necessary [to constitute a 'pattern'], they may not be sufficient." That language was taken directly from this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The trial court refused to deliver the requested instruction, and the defendant objected.

In instructing the jury about the charges against each individual defendant, the trial court delivered the following instruction regarding defendant Granito:

With respect to the defendant Samuel S. Granito, the Government must prove beyond a reasonable doubt that he engaged in a pattern of racketeering activity consisting both of the following offenses, as alleged in paragraph 6(e) of Counts One and Two of the indictment: (1) conspiring to murder and being accessory before the fact of the murder of Angelo Patrizzi. And (2) conducting an illegal gambling business involving poker games at Boston.

Tr. 127-114. The court further told the jury that they must "... unanimously agree as to which of the two or more acts of racketeering, if any, [a defendant] has committed or aided and abetted in the committing." Tr. 127-115.

At the conclusion of the jury charge, counsel for Granito objected once again to the court's failure to strike the predicate act alleging accessory before the fact to murder. Tr. 127-135. He argued that if the accessory to

murder predicate act was not to be stricken, then at least the verdict form should provide the jury with an opportunity to specify which predicate acts they were finding as to each individual defendant. *Id.* The government opposed such a special verdict form, opting for a general verdict form. Tr. 127-157-158. The district court rejected the proposal by Granito's counsel and employed a general verdict form.

During its deliberations, the jury submitted a question to the court asking whether the accessory to murder and conspiracy to murder predicate acts were separate acts and whether the jury had to find both in order to satisfy the elements of RICO. The court responded that "they are two separate acts" and that either one *or* the other had to be proven beyond a reasonable doubt. Tr. 137-7.

On February 26, 1986, following 136 days of trial and lengthy jury deliberations, the jury returned its verdict. Petitioner Samuel S. Granito was convicted of all three counts charged against him. On April 3, 1986, Granito, who is now 83 years old, was sentenced to twenty years' imprisonment and a \$25,000 fine on the substantive RICO count (Count 2); a concurrent sentence of ten years' imprisonment and a \$25,000 fine, suspended on the RICO conspiracy count (Count 1); and sentence of five years' imprisonment, suspended, and a \$10,000 fine on the gambling count (Count 4), for a total of 20 years' imprisonment and fines totalling \$35,000.

On appeal Granito contended that the RICO convictions had to be reversed because insufficient

evidence was presented to prove that Granito was an accessory before the fact to the murder of Angelo Patrizzi. There was no proof that Frederick Simone played any role in Angelo Patrizzi's eventual death. Because the jury returned a general verdict on both of the RICO counts, Granito argued, the RICO convictions must be overturned because it was impossible to know whether the jury relied upon the insufficient accessory charge as one of the predicate acts it found under RICO. 54a-65a.

The court of appeals agreed that the government had proffered insufficient evidence to sustain the accessory to murder charge. 60a-61a. However, it rejected the petitioner's contention that the general RICO verdicts must be set aside. Instead, the court of appeals held that reversal of Granito's RICO conviction was not required because it concluded that if the jury had relied upon the insufficiently-supported accessory to murder charge as a predicate act, then it must "of necessity" have relied upon the sufficiently-supported conspiracy to murder charge as well. 64a-65a.

Granito also argued that the First Circuit should reverse his RICO convictions because the pattern element was unduly vague as applied to his conduct since there was no relationship between the alleged murder of Patrizzi and the conduct of the illegal gambling business. The First Circuit acknowledged that "potential uncertainty exists regarding the precise reach of RICO's 'pattern of racketeering' element." 12a. The court did not dispute Granito's argument that there was no evidence to show that Patrizzi's death was related to the card game or *vice*

versa. The court held that it was sufficient, for constitutional purposes, if the acts were related to the affairs of the enterprise. 14a. The court of appeals also rejected Granito's argument that the lower court erred in failing to give the requested instruction based upon *Sedima*. 89a-91a.

REASONS FOR GRANTING THE PETITION

1. The lower court's decision, permitting general RICO verdicts to stand even though one of the three predicate acts was supported by insufficient evidence, conflicts with this Court's decisions in *Zant v. Stephens*, 462 U.S. 862, 880-84 (1983), *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), and *Yates v. United States*, 354 U.S. 298, 312 (1957). In *Zant*, the Court held that

[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881. The justification for such a rule is self-evident. In *Haupt v. United States*, 330 U.S. 631, 641 n.1 (1947), the Court held:

[W]here several acts are pleaded in a single count and submitted to the jury under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts, or a special verdict were

required as to each overt act of a single count, the conviction could be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved.

See also Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); *Int. Bro. of B., I.S., B., F. & H. v. Hardeman*, 401 U.S. 233, 252 (1971) (White, conc.) ("It is as much a denial of due process to sustain a conviction merely because a verdict of guilty *might* have been rendered on a valid ground as it is to send an accused to prison following conviction on a charge on which he was never tried.") (emphasis in original).

The courts of appeals have faced two different scenarios in addressing cases where juries returned general RICO verdicts and one or more predicate acts are deemed invalid. First, and easiest, are those cases in which the defendant was only charged with two predicate acts, and one of those is later determined to be legally insufficient to constitute a predicate act. In such cases, reversal is required. *See, e.g., United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) (RICO conspiracy conviction of defendant Tomasulo must be reversed since he was only charged with two predicate acts, one of which was determined by the court of appeals to be legally insufficient).

Second, and more difficult, are the cases in which two or more legally sufficient predicate acts remain after the legally insufficient acts are cast aside. In this situation,

the courts of appeal have long been in conflict. Some circuits have held that the RICO conviction must be reversed because the appellate court cannot be certain that the jury did not rely upon the legally insufficient predicate acts, without engaging in impermissible speculation. See, e.g., *United States v. Walgren*, 885 F.2d 1417, 1424-26 (9th Cir. 1989); *United States v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 3190 (1989); *United States v. Holzer*, 840 F.2d 1343, 1350-52 (7th Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 315 (1988); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987), cert. denied, ___ U.S. ___, 109 S.Ct. 2086 (1989); *United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir. 1984); *United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979).

In *Kragness*, 830 F.2d at 861, the court reversed a defendant's RICO conviction, declaring:

Although evidence of many other predicate acts was strong, we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed. There is a possibility that his conviction is based on a finding that he committed [legally insufficient] acts 10(a) and 10(b), but no others. As a practical matter, this seems most unlikely, but in a criminal case a conviction may not be upheld on the basis of speculation or inference, however strong, of this kind. It is the jury that must convict, not an appellate court. If the instructions leave open the logical possibility that the verdict is based on a legally insufficient

predicate, the conviction cannot stand.

See also United States v. Lopez, 803 F.2d 969, 975 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) ("A conspiracy conviction must be reversed if the trial court instructs the jury that it need find only one of the multiple objects alleged in order to convict of conspiracy in a case in which the reviewing court holds any one of the supporting counts legally insufficient.")

The Fifth Circuit, in contrast, permits RICO convictions to stand so long as the jury convicted the defendant of at least two valid predicate acts which were also charged as substantive counts in the indictment. *See, e.g., United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. Unit B 1982), *cert. denied*, 464 U.S. 965 (1983).

The courts of appeals in the First, Sixth and Eleventh Circuits have gone even farther to sustain RICO convictions where at least one of the predicate acts has been deemed insufficient. In those circuits, the conviction will be affirmed even if the remaining predicate acts were not charged as substantive counts, if the appellate court, by delving into what it believes the thought processes of the jury to have been, determines that the jury must have found at least two legally sufficient predicate acts. In *United States v. Corona*, 885 F.2d 766 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1838 (1990), for example, the district court dismissed six mail fraud predicate acts because of the Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). The court of appeals reversed one Travel Act predicate act and was left with four legally

sufficient predicate acts out of the eleven charged in the indictment. Only one of the remaining four predicate acts was also charged in a separate count in the indictment. Because the defendant conceded that the "mail fraud charges subsumed the Travel Act charges," a majority of the court of appeals found that the "jury could not reasonably have found that Ray Corona performed the mail fraud but not the Travel Act conduct." 885 F.2d at 774-75. Judge Vance dissented, citing *Ruggiero*, and would have held that a new trial was required on the RICO counts, "since it cannot be determined whether [the jury] based its [general] verdict on at least two valid predicate acts." 885 F.2d at 775. *See also Callanan v. United States*, 881 F.2d 229, 234-35 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1816 (1990).

The conflict on this issue between the Third and Fifth Circuits was noted by Justices White and Brennan in *McCulloch v. United States*, 484 U.S. 947 (1987), dissenting from the denial of certiorari. Since the Court declined to consider the question in *McCulloch*, the courts of appeals have fallen into further conflict, as the instant case demonstrates.

No defendant may be convicted of a crime unless the jury finds that the government has satisfied its burden of proving each and every element of the offense charged beyond a reasonable doubt. *See In Re Winship*, 397 U.S. 358 (1970). A reviewing court must not speculate on the decision-making process of the jury. *See, e.g., Dunn v. United States*, 284 U.S. 390, 394 (1932). A jury may return an inconsistent verdict. *United States v. Capone*, 683 F.2d

582, 590 (1st Cir. 1982). A jury may convict a defendant on some counts, and not others, even though the underlying facts are closely related. *United States v. Elders*, 569 F.2d 1020, 1026 (7th Cir. 1978). Indeed,

[e]ven where it is apparent that if one is guilty of aiding and abetting, that person of necessity must also have been a conspirator, the cases are clear that the jury may acquit on the conspiracy and convict on aiding and abetting.

United States v. Krogstad, 576 F.2d 22, 29 (3d Cir. 1978).

Taken together, these legal principles stand for a single basic proposition -- the jury is free to deliberate and render its verdict as it sees fit, without regard to what an appellate court might think of its reasoning, its deliberative process, or its decision. In examining a general verdict, there is simply no way for a reviewing court to know what a jury "necessarily must have found" in reaching its conclusion. An attempt to do so requires the reviewing court to put itself in the minds of the jurors and speculate as to how they looked upon the evidence and applied the trial court's instructions. It may well be possible to state with confidence how a rational jury should have proceeded and what a reasonable jury should have thought. Yet, as Justice Jackson observed in a decision which presaged *Winship* by nearly twenty years: "Juries are not bound by what seems inescapable logic to judges." *Morissette v. United States*, 342 U.S. 246, 276 (1951).

Thus, the courts of appeals which have upheld

RICO convictions notwithstanding one or more legally insufficient predicate acts have done so by impermissibly trenching upon the exclusive fact-finding province of the jury. This case provides an appropriate vehicle for this Court to put a halt to that disturbing trend and reinforce the vitality of *Stromberg* and its progeny.^{5/}

In upholding Granito's RICO convictions, the First Circuit relied principally upon *United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). In *Ochs*, the court articulated an exception to the general rule that a general verdict must be set aside if the jury was instructed it could rely on any of several alternative grounds and one of those

^{5/} The analysis adopted by the First, Fifth, Sixth and Eleventh Circuits is also problematic because it reduces the meaning of the term "pattern" to a simple numerical calculation. In those circuits, so long as the appellate court can divine some manner in which the jury probably found two predicate acts to have been proven, the conviction will be upheld. Completely ignored is this Court's struggle, reflected in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893 (1989), to give some meaning to the term "pattern." The RICO statute, of course, does not define pattern. It merely states that a pattern requires at least two acts of racketeering activity. In *Sedima* and *Northwestern Bell*, the Court held that to meet the pattern requirement, the government must prove that the predicate acts found by the jury are related in some fashion and demonstrate, or pose the threat of, continuing criminal activity. If a jury is properly instructed, and follows the instructions, then it will have found both relationship and continuity. It is one thing for an appellate court, as the First Circuit did here, to speculate about which predicate acts the jury necessarily found. It is quite another to go a step further and say that the jury must also have found that the necessarily found predicate acts also satisfied the relationship plus continuity requirement.

grounds is deemed insufficient. An exception to that rule, articulated in *Ochs*, is that reversal is not required "where uncertainty as to the ground upon which the jury relied can be eliminated." *Id.* In the instant case, the court held, the jury *necessarily* convicted Granito for conspiracy to murder, rendering his RICO convictions valid.

The court's application of the *Ochs* exception to the case at bar is flawed in two distinct respects. First, as noted above, uncertainty as to the ground upon which the jury relied cannot be eliminated here. There is simply no way of knowing, without delving into the jury's collective mind and imputing an appellate court's sense of logic and reason, which predicate acts the jury actually found. In addition, neither *Ochs* nor its progeny involved a case, like this one, where the jury was required to pass on different separate offenses charged against the defendant. In *Ochs*, there was a single conspiracy count at issue with three different theories of fraud alleged. 842 F.2d at 520. Similarly, in *United States v. Jacobs*, 475 F.2d 270, 281-283 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973), a single conspiracy count was again at issue with two alternative theories of culpability offered by the government. It is one thing to assert, as the court did in *Ochs*, that the jury may not have bought one theory without necessarily buying another. It is quite another thing to say, as the court has here, that the jury may not have found the defendant guilty of one *offense* (accessory to murder) without also finding him guilty of another (conspiracy). The latter trenches upon the fundamental principle of due process which requires the *jury* to find every element of

every offense charged. Such an expansion of the *Ochs* exception is constitutionally impermissible and not supported by legal precedent.

The court of appeals' analysis of the general verdict reflects a determination that the defendant could not have been convicted as an accessory without necessarily being convicted as a conspirator as well. As a matter of law, such a determination flies in the face of state and federal precedent. The Massachusetts Supreme Judicial Court has held: "It was within the province of the jury to acquit one as a conspirator and to convict him as an accessory before the fact. The offenses were not the same, and the verdicts were not inconsistent." *Massachusetts v. Bloomberg*, 302 Mass. 349, 356, 19 N.E.2d 62 (1939). Federal courts have reached the same conclusion in addressing charges of aiding and abetting under 18 U.S.C. § 2 (West 1969). *E.g. United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir.), *cert. denied*, 454 U.S. 1126 (1981) ("Even if a jury acquits on a conspiracy charge, it may convict on aiding and abetting."); *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978). It is obviously possible for a jury to convict a defendant as an accessory, while failing to convict him of conspiracy. That is what may have happened in this case, and such a possibility renders the RICO verdicts null and void.

Indeed, in light of the trial judge's answer to the jury's question posed during its deliberations, it is possible that the jury did not even consider both predicate acts related to the Patrizzi murder. If, for example, the jury unanimously found Granito guilty as an accessory to murder (the invalid predicate act), it may never have

addressed the conspiracy to murder predicate act charged. This, of course, is speculation, but no more so than that indulged in by the court of appeals in reaching an opposite conclusion.

In the instant case, the court of appeals erred in seeking to insinuate itself into the minds of the jurors and speculate as to what they must have been thinking when they returned a general verdict convicting Granito for violating the RICO statute. The court's theory of the jury's mental process, 65a, is certainly plausible. It may well be that some or all of the jurors accepted the government's interpretation of the pertinent tape-recorded conversations. Yet, the court overstepped its proper bounds in ruling, as a matter of law, that the jury "necessarily" so found. However logical such an interpretation may seem to the court, there is simply no way at this juncture to determine how the jury collectively reached its general verdict.^{6/} The speculation inherent in the court's

^{6/} It is noteworthy that the petitioner did everything he could to ensure that the basis of the jury's verdict would be intelligible. First he moved that the predicate act charging accessory to murder be withdrawn from the jury's consideration because it was supported by insufficient evidence. Unfortunately, the government opposed striking that predicate act, and the district court rejected Granito's motion. Ultimately, the court of appeals agreed with the substance of Granito's position -- there was insufficient evidence to sustain the charge.

Second, Granito proposed that the district court submit a special verdict to the jury which would require the jury to indicate which predicate acts it relied upon if it were to find a pattern of racketeering activity. In *United States v. Ruggiero*, 726 F.2d at 922-23, the court of appeals proposed the use of such a procedure to avoid

(Footnote continued on following page...)

opinion invades and supplants the exclusive province of the jury. Accordingly, the court's conclusion that the jury did not, in fact, rely upon the impermissible accessory to murder predicate act in convicting Granito cannot stand.

This Court should grant the writ of certiorari to resolve the recurring problem confronting the courts of appeals in deciding what to do with RICO convictions that may have been based in part upon one or more legally insufficient predicate acts.

2. The due process clause of the Fifth Amendment to the United States Constitution prohibits the prosecution of a person pursuant to a statute whose terms are so vague that he must guess at their meaning. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). See also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). RICO, of course, does not contain a definition of the term "pattern of racketeering activity." All that is said in the statute is that a pattern "requires" at least two acts. This Court and the courts of appeals have struggled to fill in the interstices left by

^{6/}(...Footnote continued from prior page)
precisely the problem which arose in this case. See also *United States v. Riccobene*, 709 F.2d 214, 228 n.19 (3d Cir.), cert. denied, 464 U.S. 849 (1983). In this case, the government opposed Granito's call for a special verdict form, and the district court rejected Granito's proposal.

Congress. E.g. *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

In *Northwestern Bell*, the Court noted "the plethora of different views expressed by the courts of appeals since *Sedima*" and observed that "... developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." ___ U.S. at ___, 109 S.Ct. at 2899. The Court resorted to lexicography, analogy to other provisions of the Organized Crime Control Act of 1970, and canvassing the legislative history to complete its analysis. It concluded that the concept of pattern embodies two distinct requirements -- (1) the predicate acts must be related to one another, and (2) there must be continuity among the predicate acts, or at least the threat of continuity. Recognizing that the phrase "continuity plus relationship" does not fully explicate the meaning of the term "pattern of racketeering activity," the Court conceded that the "limits of the relationship and continuity concepts ... cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." ___ U.S. at ___, 109 S.Ct. at 2902.^{2/}

^{2/} In rejecting an earlier challenge to the RICO statute, the Ninth Circuit observed that if the statute failed to provide a satisfactory definition of the term "pattern of racketeering activity," the statute would not survive a vagueness challenge. *United States v. Campanale*, 518 F.2d 352, 364, cert. denied, 423 U.S. 1050 (1975). After *Sedima* and *Northwestern Bell*, it is clear that the statute does not fulfill this consti-
(Footnote continued on following page...)

Justice Scalia, joined by three other Justices, concurred, but argued that the majority's opinion does little more than substitute one slogan -- continuity plus relationship -- for another -- pattern of racketeering activity. Justice Scalia found the majority opinion interpreting the "enigmatic term" to be inadequate. ___ U.S. at ___, 109 S.Ct. at 2906. However, Justice Scalia conceded that he was unable to offer any interpretation of "pattern" that gives more guidance concerning its meaning and application. He also speculated that RICO might not survive a constitutional challenge on vagueness grounds because of this serious ambiguity. ___ U.S. at ___, 109 S.Ct. at 2908.

Even this Court's recent efforts to inform the ambiguous, undefined phrase "pattern" may not be enough to give ordinary people fair notice that their conduct might be deemed to be a pattern. It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. "It would be hard to hold that, in advance of any judicial utterance upon the subject, [the defendants] were bound to understand the challenged provision according to the language later used by the court." *Lanzetta v. New Jersey*, 306 U.S. 451, 456 (1939).

The indictment in the instant case did not allege that Granite committed numerous acts of closely-related

^{2/}(...Footnote continued from prior page)
tutional requirement.

rackeeteering acts. He was charged with a total of three predicate acts. The gambling predicate act bore no relationship to the two acts pertaining to the Patrizzi murder. Under the circumstances, Granito would have had to speculate about whether his conduct fell within the parameters of the RICO statute.^{8/} Because the statute furnishes no guide by which one can reasonably determine whether conduct may be penalized as a pattern by the RICO statute, the trial court erred in denying Granito's motion to dismiss the RICO counts of the indictment on constitutional grounds. Accordingly, this Court should grant the petition to decide whether RICO may be applied to predicate acts which are not related to each other, but only to the alleged enterprise.

^{8/} Other factors also contributed to the ambiguity of RICO, as applied to Granito in this case. At the time of his alleged misconduct, the court had held in *United States v. Turkette*, 632 F.2d 896 (1980), that RICO does not apply to wholly unlawful enterprises. It was not until this Court reversed *Turkette*, 452 U.S. 576 (1981), that the statute clearly applied to an enterprise such as that described in the indictment. Moreover, the enterprise itself, as described in the indictment, was defined in amorphous and sundry terms. The parties and the court engaged in considerable discussion about the appropriate description which should be submitted to the jury -- whether the enterprise was La Cosa Nostra, the Patriarca Family, a subsidiary of the Patriarca Family, or something else. Finally, it was not clear at the time of the return of the indictment that the statute encompassed conspiracy to murder as a predicate act. It was only in *United States v. Angiulo*, 847 F.2d 956, 963 n.8, *cert. denied*, ___ U.S. ___, 109 S. Ct. 314 (1988), that the First Circuit decided that conspiracy to murder may constitute a predicate offense under RICO.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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June 1990

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JUN 25 1990
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No.
SAMUEL S. GRANITO,
PETITIONER
v.
UNITED STATES,
RESPONDENT

No.
GENNARO ANGIULO, FRANCESCO ANGIULO,
DONATO ANGIULO, AND MICHELE ANGIULO,
PETITIONERS
v.
UNITED STATES,
RESPONDENT

Appendix to
Petitions for Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

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**In the Supreme Court
of the United States**

October Term, 1989

No.

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UNITED STATES,

RESPONDENT

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**GENNARO ANGIULO, FRANCESCO ANGIULO,
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v.

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**Appendix to
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Table of Contents

Appendix A

United States v. Angiulo,
897 F.2d 1169 (1st Cir. 1990) 1a

Appendix B

United States v. Angiulo,
No. 83-235-N, slip op.
(D. Mass. July 7, 1985)
(Memorandum and Order Regarding
Individual Motions of Samuel
Granito) 110a

Appendix C

United States v. Angiulo,
Nos. 86-1331, 89-1212, 89-1800
(1st Cir. Mar. 26, 1990)
Order denying Petition for
Rehearing of Samuel Granito 113a

Appendix D

United States v. Angiulo,
Nos. 86-1331, 89-1212, 89-1800
(1st Cir. Mar. 26, 1990)
Order denying Petition for
Rehearing of United States 114a

Appendix E

United States v. Angiulo,
No. 86-1331
(1st Cir. Mar. 5, 1990)
Judgment 116a

Appendix F

United States v. Angiulo,

No. 89-1212

(1st Cir. Mar. 5, 1990)

Judgment

117a

Appendix G

United States v. Angiulo,

No. 89-1800

(1st Cir. Mar. 5, 1990)

Judgment

119a

APPENDIX A

Nos. 86-1331, 89-1212, 89-1800

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,

Appellee,

v.

GENNARO J. ANGIULO, DONATO F. ANGIULO,
SAMUEL S. GRANITO, FRANCESCO J. ANGIULO
and MICHELE A. ANGIULO,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, *U.S. District Judge*]

Before

Bownes, Breyer and Selya,

Circuit Judges.

Anthony M. Cardinale for Gennaro Angiulo.

Robert L. Sheketoff, with whom *Zalkind, Sheketoff, Homan, Rodriguez & Lunt*, was on brief for Donato Angiulo.

James L. Sultan, with whom *Charles W. Rankin* and *Rankin & Sultan* were on brief for Samuel Granito.

Elliot M. Weinstein for Francesco Angiulo.

Henry Katz for Michele Angiulo.

Frank J. Marine, Attorney, Department of Justice, with whom *Diane M. Kottmyer*, *Ernest S. Dinisco*, *Carol Schwartz*, Special Attorneys, Department of Justice, and *Wayne A. Budd*, United States Attorney, were on brief for the United States.

MARCH 5, 1990

BOWNES, *Circuit Judge*. These are consolidated appeals from convictions on jury verdicts rendered after an eight-month trial. The defendants, Gennaro Angiulo, Donato Angiulo, Samuel Granito, Francesco Angiulo, and Michele Angiulo, are all members or associates of the Patriarca Family of La Cosa Nostra. They were charged with conspiracy to participate and participating in an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) and (c), as well as with numerous racketeering, loansharking, and gambling offenses.^{1/} Each having been convicted and sentenced

^{1/} The indictment initially named Vittore Nicolo Angiulo and Ilario M.A. Zannino as additional defendants, but both were severed from the trial due to health problems. Nicolo Angiulo subsequently died, while Zannino was tried separately, and convicted, on three of the original eight counts. Zannino's appeal from these convictions was consolidated with these appeals for purposes of oral argument only, and
(Footnote continued on following page...)

on various counts, they now appeal on a number of grounds from their convictions. They also appeal from the district court's order forfeiting certain of their assets under 18 U.S.C. § 1963. For the reasons set forth below, we affirm the defendants' convictions and sentences, but reverse certain portions of the forfeiture order.

I. BACKGROUND

The evidence introduced against defendants at trial was, in large part, the product of court-authorized electronic surveillance conducted at 98 Prince Street and 51 North Margin Street in Boston's North End during the period January-May 1981. Through a combination of audio and video surveillance, FBI agents monitored the arrivals and departures of persons from these premises, as well as their conversations on the premises. Tapes and transcripts from this surveillance were introduced at trial, accompanied by material seized during the execution of various search warrants. There was also testimony by a number of government witnesses. Our review of the evidence is made, as required, in the light most favorable to the government. At this time, we summarize those facts most pertinent to the issues that have been raised on appeal.

Defendants were all members of the Patriarca Family of La Cosa Nostra. Gennaro Angiulo was the underboss of this organization, in charge of its day-to-day

¹/(...Footnote continued from prior page)
his convictions have since been affirmed. See *United States v. Zannino*, No. 87-1221 (1st Cir. Jan. 10, 1990).

operations. Immediately beneath him in the command hierarchy were "Capo Regimes" (captains) Samuel Granito and Donato Angiulo. Beneath the Capo Regimes, the organization consisted of soldiers and then of associates. Francesco Angiulo was a soldier, and also served as accountant for the organization's gambling and loan-sharking businesses. Michele Angiulo was an associate.

The organization was headquartered at 98 Prince Street and engaged in widespread racketeering, gambling, and loansharking activities. Because the specific nature of some of these activities is significant for certain of the issues before us, we state the relevant facts regarding them in some detail.

A. *Gambling Activities*

The defendants, in various combinations, were charged with the operation of four illegal gambling businesses. The first business involved the operation by Gennaro and Francesco of a series of "Las Vegas Nights" gambling events from approximately late 1978 to mid-1981. The events were a type of bazaar, ostensibly operated to benefit non-profit, charitable organizations. The proceeds from these events, however, were not given to charitable organizations, but were kept by their La Cosa Nostra operators. The immediate manager and supervisor of the Las Vegas Nights was Gennaro's son, Jason Angiulo, assisted by Carmen Lepore.^{2/} Gennaro

^{2/} For an independent discussion of Jason Angiulo's role in running the Las Vegas Nights, see *United States v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert. denied*, 109 S. Ct. 314 (1988).

was the overall owner of the business, while Francesco acted as the accountant. All of these participants shared in the profits.

The second gambling business involved the operation of twice-weekly barbooth games at the Demosthenes Democratic Social Club in Lowell, Massachusetts during 1980-81. Barbooth is a dice game in which, typically, twelve or more players place bets on whether the shooter of the dice will roll a winning or losing combination of numbers. The house takes a percentage - usually 2-1/2% - of the amount bet on each hand. The immediate manager of the Lowell barbooth games was Peter Vulgaropoulos, assisted by Vincent Roberto as assistant manager. Ilario Zannino directed the operation and had a financial interest in it. Francesco was the accountant, and Gennaro was the ultimate overseer.

The third gambling business consisted of the operation of a highly organized and extensive illegal numbers betting business in the Boston area. Approximately 180 people were involved in the operation of this business, including agents to collect the bets, sub-books to control the agents and pay the winning number, and office manager to supervise the day-to-day management of the business and settle accounts with the sub-books. Gennaro was the principal owner and overall boss of the business. Francesco was the day-to-day supervisor of the mid-level operation. Donato controlled a number of sub-book operations and had responsibility for collecting money. Finally, Michele stood in for Francesco and also assisted in controlling several of the sub-book operations.

The fourth and final business involved the operation of high stakes poker games at 51 North Margin Street. Electronic surveillance revealed that a number of people participated in the running of the games and possessed a financial interest in them. Specifically, defendants Gennaro Angiulo, Samuel Granito, and co-conspirators Ilario Zannino, Ralph Lamattina and Nicola Giso each had financial interests in the game. Gennaro was the overall boss. Francesco acted as the accountant. John Cincotti managed the staff, extended credit to players, and collected their debts. Finally, Zannino supervised Cincotti and directly oversaw the operation.

B. *Extortionate Credit Transactions*

In addition to their gambling activities, certain of the defendants also were involved in extortionate credit transactions. In particular, defendants Gennaro, Donato, Francesco, and co-conspirator Zannino engaged in various loansharking operations. One such operation involved extortionate loans to Donald Smoot, a regular player in the North Margin Street poker games. In early 1981, Smoot owed \$14,000 to Zannino and paid interest (or "vig") at the rate of one percent per week on this debt. During this same time period, Smoot owed money to Donato as well and paid him vig of 2-1/2% per week. Intercepted conversations revealed that the amount of Smoot's debt to Donato was also \$14,000, and that Gennaro and Francesco had an interest in the loan.

A separate transaction involved a \$200,000 loan to Joseph Palladino, who was the principal in the Palladino Real Estate Trust, which owned property on Canal Street

in Boston. Palladino paid interest of one percent per week on this debt. The debt eventually was cancelled after a series of real estate transactions through which Palladino's Canal Street property was transferred first to the Angiulos' sister and then from the sister to the Angiulos, doing business as Huntington Realty Trust Company.

C. *Murder Conspiracies*

The final group of racketeering activities charged in the indictment involved a series of conspiracies to obstruct justice and to commit murder. Most of these conspiracies, including the conspiracies to murder Walter LaFreniere, Walter Bennett, William Bennett and Joseph Barboza, are not at issue in this appeal. The murder of Angelo Patrizzi is, however, very much at issue and we state the facts pertaining to this murder in some detail, both here and later in the opinion.

In early 1981, Angelo Patrizzi was reputedly planning to kill Frederick Simone and Cono Frizzi - two Boston members of the Patriarca Family - because of his belief that they were involved in the 1978 murder of his half-brother. A decision was made to kill Patrizzi before he succeeded in killing either Simone or Frizzi. As evidence of these plans to kill Patrizzi, the government introduced intercepted conversations from a March 11, 1981 meeting among Granito, Simone and Gennaro Angiulo at which Simone and Granito related to Gennaro several unsuccessful attempts on their part to kill Patrizzi. At this March 11 meeting, Gennaro indicated that he would assist in the effort, and during a conversation the

next day with Zannino, enlisted Zannino's assistance as well.

On March 13, 1981, Angelo Patrizzi disappeared. In a conversation intercepted on April 3, 1981, Zannino told John Cincotti and Ralph Lamattina that Patrizzi had been killed nine men and put in a car trunk. On June 11, 1981, authorities found Patrizzi's decomposed body in the trunk of a stolen car in Lynn, Massachusetts. Gennaro Angiulo and Granito were charged with conspiring to murder Patrizzi and with being accessories before the fact to his murder.

D. *The Jury's Verdict*

The above activities, among others, were set forth in the indictment against the relevant defendants as predicate acts constituting a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).^{3/} With the exception of the murder conspiracies, the activities also were charged in the indictment as separate substantive counts against the applicable defendants.

Following an eight-month jury trial, Gennaro Angiulo, Donato Angiulo, Francesco Angiulo and Samuel Granito were each convicted, under RICO, of conspiring to participate, and participating, in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d) and (c).

Gennaro Angiulo was also convicted of the following offenses: four counts of conducting illegal gambling

^{3/} 18 U.S.C. §§1961-1968 (1988).

businesses, in violation of 18 U.S.C. § 1955; two counts of conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. § 892(a); conspiring to collect, and collecting, an extortionate extension of credit, in violation of 18 U.S.C. § 894(a); obstruction of, and conspiring to obstruct, justice, in violation of 18 U.S.C. § 1503 and 18 U.S.C. § 371.

Donato Angiulo was also convicted of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955 and conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. § 892(a).

Granito was also convicted of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955.

Francesco Angiulo was also convicted of the following offenses: four counts of conducting illegal gambling businesses, in violation of 18 U.S.C. § 1955; two counts of conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. § 892(a); and conspiring to collect an extortionate extension of credit, in violation of 18 U.S.C. § 894(a).

Michele Angiulo was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955.

The defendants raise numerous issues on appeal, some of which apply to only one or two of them, and some of which apply to them all. We discuss each of the issues.

II. RICO'S PATTERN OF RACKETEERING ACTIVITY

Defendants' first challenge is to the constitutionality of the RICO provisions under which they were convicted, 18 U.S.C. § 1962(c) and (d). These provisions state,

in pertinent part:

§ 1962. Prohibited activities

...

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1988).

Defendants specifically challenge the "pattern of racketeering activity" element of RICO, contending that the term "pattern" is so enigmatic and ambiguous as to be void for vagueness.

The applicable standard requires that we find the statute unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954). Thus, we must analyze RICO's "pattern of racketeering activity" element to determine if it is sufficiently susceptible of definition to give persons of ordinary intelligence in the defendants' situation fair notice that the gambling, loansharking and conspiracy offenses with which they were charged consti-

tuted an unlawful "pattern of racketeering activity."

The Supreme Court's latest discussion of the meaning of "pattern of racketeering activity" was in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). In *H.J. Inc.*, the Court stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* at 2900. Therefore, continuity plus relationship is the formula to be applied in determining whether a pattern exists.

According to the Court, the relationship requirement is satisfied if criminal acts "'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Id.* at 2901 (quoting 18 U.S.C. § 3575(e)). Continuity of the activity itself can then be shown by "proving a series of related predicates extending over a substantial period of time." *Id.* at 2902. Continuity can also be shown by proving a *threat* of continued racketeering activity, which can be established "if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id.*

Defendants challenge this definition of "pattern" as being so susceptible of differing interpretations that it is void for vagueness. In making this challenge, they rely heavily on Justice Scalia's dictum in his *H.J. Inc.* concurrence. Justice Scalia noted in his concurrence that courts have been unable to define "pattern" with any meaningful

degree of clarity, leading him to speculate that RICO would be vulnerable to a vagueness challenge. He left the question for another day because the vagueness issue had not been raised before the Court. *See H.J. Inc.*, 109 S. Ct. at 2908-09 (Scalia, J., concurring). The defendants here *have* raised the issue, however, and we must address it.

We begin by acknowledging that potential uncertainty exists regarding the precise reach of RICO's "pattern of racketeering" element. The Court itself in *H.J. Inc.* acknowledged that defining "pattern" has not proven to be an easy task and that the exact scope of the meaning of "continuity plus relationship" cannot be fixed in advance with precise clarity. *See H.J. Inc.*, 109 S. Ct. at 2899, 2902. This admission, however, does not mean that defendants' vagueness challenge necessarily succeeds. The statute is not rendered unconstitutionally vague simply because potential uncertainty exists regarding the precise reach of the statute in marginal fact situations not currently before us. *See United States v. Powell*, 432 U.S. 87, 93 (1975). Rather, in the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts. *See id.* at 92; *see also New York v. Ferber*, 458 U.S. 747, 767 (1982); *United States v. Cintolo*, 818 F.2d 980, 996 (1st Cir.); *cert. denied*, 484 U.S. 913 (1987). Thus, for defendants' vagueness challenge to succeed, they must demonstrate that the meaning and scope of RICO's "pattern" element was unclear and vague as to *their* conduct at issue *here*. Phrased another way, they must show that persons of ordinary intelligence in their situation would not have had adequate notice that the gam-

bling, loansharking and conspiracy offenses at issue here constituted a "pattern of racketeering activity" under RICO.

Defendant have not even come close to making this showing, for if anything is clear about RICO, it is that "a pattern of racketeering activity" is intended to encompass the activities of organized crime families. In *H.J. Inc.*, the Court explicitly noted that in drafting RICO to target "patterns" of racketeering activity, Congress' main focus was the eradication of organized crime. *See H.J. Inc.*, 109 S. Ct. at 2904; *see also United States v. Turkette*, 452 U.S. 576, 588-93 (1981). Given the history behind RICO, we have no doubt that the murder conspiracies and the gambling and loansharking operations for which defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO. *See United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984). Thus, although RICO's "pattern" element may be vague in some contexts, a matter on which we express no opinion, it is not vague in the context before us. A person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of RICO's pattern of racketeering activity.

Despite this clear intent of RICO to target organized crime, defendant Granito strenuously contends that he could not have known that the acts with which he was charged were sufficiently related to fall within the parameter of RICO's "pattern of racketeering activity" element. Granito also argues that there was insufficient evidence to

prove that his acts constituted a pattern.

We are not persuaded. Granito was charged with three predicate acts: (1) conspiring to murder Angelo Patrizzi; (2) being an accessory before the fact to the murder of Patrizzi; and (3) conducting an illegal gambling business (North Margin Street poker games). He argues that these acts do not constitute a pattern, nor could he have known that they might constitute a pattern, because they were unrelated in any "functional" way. In making this argument, he stresses that no evidence was introduced to show that Patrizzi's death was related to the card game or vice-versa. Although this might be so if we view the acts in a piecemeal fashion, the flaws in the argument become immediately apparent once we consider the conduct as a whole. The acts with which Granito was charged were not committed in isolation; they all were related to the affairs of the enterprise. It is the relationship between the acts and the affairs of the enterprise that renders Granito's conduct a pattern of racketeering activity under RICO. As the Second Circuit stated in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.) (en banc), cert. denied, 109 S. Ct. 3192 (1989);

In some cases both the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.

Id. at 1383. The Second Circuit noted further that "if the racketeering acts were performed at the behest of an organized crime group, that fact would tend to belie any notion that the racketeering acts were sporadic or isolated." *Id.* at 1384.

The evidence here proved beyond a reasonable doubt that the acts with which Granito was charged were linked to the affairs of the Patriarca Family. This link renders the acts sufficiently related to constitute a pattern under the meaning of RICO. Nor are we persuaded that Granito could have been unaware that these acts fell within the ambit of RICO's pattern of racketeering activity; the express intent of RICO was to target organized crime. Thus, we must reject his vagueness challenge as well.

Other defendants have adopted Granito's arguments as these arguments pertain to their particular factual situations. We need not address each defendant's situation individually. Our holding with respect to Granito is equally applicable to all.

III. JURY IMPARTIALITY

Defendant Gennaro Angiulo, joined by various co-defendants, argues that in two respects, his sixth amendment right to a fair trial by an impartial jury was violated. We consider each of his arguments in turn.

A. *Change of Venue*

Gennaro's first argument is that the district court committed constitutional error in denying his repeated motions for a change of venue due to extensive prejudicial pretrial publicity. There can be no dispute that extensive

publicity surrounded this case from the moment of the defendants' indictment. There also can be little dispute that jurors in the venire, including some of those ultimately selected for the trial, were exposed to this publicity to one extent or another. The issue is whether this publicity was so extensive and so prejudicial as to require a change of venue.

We begin by noting the fundamental principle that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), and that "a change of venue may be granted if the court determines that there exists in the district 'so great a prejudice against the defendant that he cannot obtain a fair and impartial trial.'" *United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984)(quoting *United States v. Gullion* 575 F.2d 26, 28 (1st Cir. 1978)). It is also established that a motion for change of venue "is addressed to the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion." *Id.*; see also *United States v. Kelly*, 722 F.2d 873, 881 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070 (1984).

In determining whether sufficient prejudice existed to require a change of venue, we must conduct two inquiries: (1) whether jury prejudice should be *presumed* given the facts before us; or (2) if prejudice should not be presumed, whether the jury was *actually* prejudiced. Although courts often blend the two inquiries, we will endeavor to keep them distinct. See generally *Harris v. Pulley*, 885 F.2d 1354, 1359-65 (9th Cir. 1988) (distinguishing between presumed prejudice and actual prejudice) *cert.*

denied, 58 U.S.L.W. 3450 (U.S. Jan. 16, 1990) (No. 89-767).

1. *Presumed Prejudice*

There are two factors that could call for a presumption of prejudice. First, prejudice may properly be presumed where "prejudicial, inflammatory publicity about [a] case so saturated the community from which [the defendant's] jury was drawn as to render it virtually impossible to obtain an impartial jury." *United States v. McNeill*, 728 F.2d 5, 9 (1st Cir. 1984) (quoting *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), cert. denied, 459 U.S. 846 (1982)); see also *Harris*, 885 F.2d at 1361. To justify a presumption of prejudice under this standard, the publicity must be both extensive *and* sensational in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice. See, e.g., *Murphy v. Florida*, 421 U.S. 794, 802 (1975); *United States v. Medina*, 761 F.2d 12, 19 (1st Cir. 1985); *McNeill*, 728 F.2d at 9; see also *Harris* 885 F.2d at 1362.

After examining the volumes of newspaper clippings and television news transcripts submitted by the defendants in support of their motions for a change of venue, we find that the media coverage was not so inflammatory or sensational as to require a presumption of prejudice. Although the news coverage was extensive, it largely was factual in nature, summarizing the charges against the defendants and the alleged conduct that underlay the indictment. We acknowledge that frequent references were made to "reputed crime figure Gennaro

Angiulo," "mafia boss Angiulo," or "reputed leader of Boston underworld." We find, however, that such references, although not phrased in the most genteel or flattering manner, fall significantly short of the type of emotionally charged, inflammatory, sensationalistic coverage needed to support a presumption of prejudice.

A second factor that could support a presumption of prejudice is a more indirect measure that looks at the "length to which the trial court must go in order to select jurors who appear to be impartial." *Murphy*, 421 U.S. at 802. Where a high percentage of the venire admits to a disqualifying prejudice, a court may properly question the remaining jurors' avowals of impartiality, and choose to presume prejudice. *See id.* at 802-03; *United States v. Moreno Morales*, 815 F.2d 725, 734 (1st Cir. 1987), *cert. denied*, 484 U.S. 966 (1988). In *Moreno Morales*, twenty-five percent of the venire admitted believing that defendants were guilty. We found this percentage to be too low to require a presumption that the jurors actually seated at trial - all of whom proclaimed impartiality - were indeed prejudiced. *See Moreno Morales*, 815 F.2d at 735.

The defendants here do not point to any indicia of prejudice as strong as those that were rejected by us in *Moreno Morales*. At most, they claim that jurors in the venire were familiar with the Angiulo name, and some associated it with the Mafia. Mere knowledge or awareness of a defendant's past, however, is not sufficient to presume prejudice. More must be shown, such as the actual existence of a present predisposition against defendants for the crimes currently charged. *See Murphy*,

421 U.S. at 800 & n.4. The defendants point to no such indications of prejudice in the venire, and we therefore decline to draw any presumptions of prejudice on the part of the jurors seated at trial.

2. *Actual Prejudice*

The next question is whether the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside. *See Harris*, 885 F.2d at 1363. In pursuing this inquiry, special deference is due the trial court's determination that the jurors were impartial. As we stated in *United States v. McNeill*:

If the trial judge, who conducted the voir dire and who could develop a contemporaneous impression of the extent and intensity of community sentiment regarding the defendant, believed that he had impanelled a jury of twelve open-minded, impartial persons, then we will set aside his action only where juror prejudice is manifest.

728 F.2d at 9; *see also Patton v. Yount*, 467 U.S. 1025, 1032, 1038 (1984); *Moreno Morales*, 815 F.2d at 733; *Medina*, 761 F.2d at 20.

The defendants rest their allegations of actual prejudice on the extensive pretrial publicity that existed and the jurors' exposure to that publicity. In particular, they emphasize that of the 18 jurors impanelled for trial, only 3 had not been exposed to the Patriarca-Angiulo names, and of the 12 jurors that returned verdicts, only one had not been so exposed. They also note that a number of jurors drew an association between the Angiulo

name and the Mafia.

To meet the standards of the sixth amendment and due process, however, it is not mandated that each and every juror's mind be a blank slate with respect to the defendant. See, e.g., *Medina*, 761 F.2d at 19-20; see also *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). The relevant question is whether the jurors "had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035. As the Supreme Court articulated in *Irvin v. Dowd*:

It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 722-23. Thus, the mere fact that a majority of

the impanelled jurors had been exposed to the Patriarca-Angiulo names, or that some linked the Angiulo name with the Mafia, is not sufficient to support a finding of actual prejudice. The defendants have put forth nothing to warrant a conclusion that the jurors were unable to lay aside any implications associated with the Angiulo name and reach a verdict based only on the evidence presented at trial.

The defendants' position is further weakened by the exhaustive procedures employed by the trial court below to screen prospective jurors and impanel an impartial jury. The court examined 260 prospective jurors, requiring each to answer comprehensive written questionnaires and respond to oral questions regarding, among other things, their exposure to pretrial publicity, their knowledge of the case or familiarity with any of the parties, their attitude towards organized crime, and the like. Those who indicated partiality were excused for cause, and the 18 jurors ultimately impanelled stated that they had formed no opinions or conclusions about the case and could render an impartial verdict based on the evidence at trial. Although we do not blindly accept such avowals of impartiality, to justify disregarding them there must be solid evidence of distinct bias. *See Medina*, 761 F.2d at 20 (reviewing, with approval, extensive *voir dire* procedures employed by the trial court); *McNeill*, 728 F.2d at 10. We have found none. In light of the thorough *voir dire* procedures employed by the trial court, and the repeated assurances of impartiality given by the impanelled jurors, we find that no actual prejudice tainted the

jury. This determination, when combined with our rejection of the claim of presumed prejudice, leads us to hold that no constitutional error resulted from the trial court's denial of the motion for change of venue.

B. *Juror Misconduct*

The defendants also contend that their constitutional right to an impartial jury was violated due to the trial court's failure to dismiss several jurors on the grounds of bias and misconduct arising from three distinct incidents. We first summarize the three incidents that allegedly fostered juror bias, and then analyze defendants' constitutional claims.

The first incident involved a juror who requested that the court excuse him from the jury due to his girlfriend's extreme fears that his service on the jury would lead to retribution by the Mafia. The juror notified the court that he had spoken with three other members of the jury about his girlfriend's fears. In response, the district court excused the juror and then questioned individually the three jurors with whom the juror had spoken to ascertain what they had been told and whether any difficulties had arisen with respect to their continued ability to remain impartial. The three jurors assured the court that they had merely been told of the girlfriend's fears and that this would have no effect on their ability to remain impartial. In light of these responses, the court retained the three jurors on the jury, and informed the rest of the jury that the first juror had been excused for personal reasons. The court also asked each of the remaining jurors separately whether anything had occurred

to affect his or her impartiality, and all responded in the negative.

The second incident occurred during closing arguments when a juror informed the court that a friend of hers had relayed to her a bribe offer from third parties to vote not guilty. She told the court that she had rejected the offer, and had not spoken with any other jurors about the bribe attempt. After an examination of this juror, the court excused her, and notified the remaining jurors that she had been excused for personal reasons. The court also notified the jurors that they would be sequestered for the remainder of the trial.

Not surprisingly, this story was reported in the press almost immediately. Subsequent questioning of each juror by the court revealed that four jurors had been exposed, in varying degrees, to the news coverage.

Juror #37 said that while on the subway she had seen a newspaper headline reporting that a juror had been threatened. She admitted that she was concerned by the story, had tried to read more, but was unable to do so. Juror #68 reported that juror #37 had told her of this newspaper headline. Juror #25 also reported seeing a newspaper headline about a juror being approached, but had read no more of the article. Finally, juror #4 reported overhearing two people talking about the case and the fact that somebody had talked to a juror.

In response to individual questioning, each of these jurors assured the court that he or she had not formed any conclusions about the case as a result of exposure to the news coverage, and would be able to render a verdict

impartially based only on the evidence introduced at trial. Over the defendants' objections, all of these jurors were retained.

The third and final incident occurred at the outset of the jury's deliberations when juror #104 approached a United States marshal and handed him two newspaper articles concerning the case that had been found in the jury room. In response to questioning, juror #104 stated that he had seen juror #64 pull the articles from an exhibit box, and had seized the articles from juror #64 immediately because he knew the articles were not supposed to be there. Juror #104 admitted glancing through approximately the first third of each article, but stated that he had not read the articles in their entirety. The limited portions of the articles that he could recall summarized past incidents involving certain Angiulo jurors, reporting that one juror had been dismissed because he feared for his safety; that another had been dismissed after being approached by a neighbor; and that a friend of a third juror had reported that some of the jurors had made up their minds as to the defendants' guilt or innocence prior to deliberations. Juror #104 also said that juror #37 may have seen the articles.

Juror #64 then was questioned and acknowledged finding the articles between two exhibit boxes in the deliberation room. He stated, though, that he saw one line at most before juror #104 seize the articles from him. He also acknowledged that juror #37 may have observed the articles, but he was not completely sure that she had.

Juror #37 was questioned and denied seeing any

part of the articles. Finally, both juror #104 and juror #64 assured the court that their exposure to the news coverage had not affected their ability to remain impartial and render a verdict based solely on the evidence introduced at trial. All three jurors were retained.

Defendants raise allegations of juror bias and misconduct with respect to each of these three incidents. We consider each incident in turn.

1. *Girlfriend's Fears*

The threshold question with respect to this incident is whether or not the girlfriend's expressions of fear about possible Mafia retaliation should be analyzed under the standard governing *ex parte* contacts with jurors. In *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court stated that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Id.* at 229. The burden then shifts to the government to show that the contact was harmless to the defendant. *Id.* The paradigmatic example of such an *ex parte* contact with a juror is a threat, bribe, or statement containing prejudicial information made directly to a juror by a third party stranger.

The situation before us differs in notable respects from this paradigm. First, the "contact," if it can be called that, was initiated by an intimate relation of a juror, rather than by a third party stranger. Second, direct contact was limited solely to the girlfriend and her boyfriend juror; the other affected jurors only learned *indirectly* of the situation through the boyfriend. Third, the contact involved only

subjective expressions of fear, rather than the traditional threat, bribe, or statement containing prejudicial substantive information. These facts raise a real question as to whether this incident is properly governed by the standards that apply to true *ex parte* contacts. Because the resolution of defendants' allegation does not turn on the answer to this question, however, we will assume without deciding that the standards governing *ex parte* contacts do apply and that, under *Remmer*, the girlfriend's conduct raised a presumption of prejudice that shifted the burden to the government to show that the contact was harmless.

In an effort to avoid the ensuing burden were we to apply such a presumption, the government states in a footnote in its brief that the Supreme Court abandoned *Remmer's* presumption of prejudice standard in *Smith v. Phillips*, 455 U.S. 209 (1982), and *Rushen v. Spain*, 464 U.S. 114 (1983), and instead placed the burden on the defendant to establish actual prejudice. See Brief for the Government at 91 n.106. Although the government is careful to cite the two circuit opinions that have accepted, in whole or in part, this abandonment theory, see *United States v. Madrid*, 842 F.2d 1090 (9th Cir.), *cert. denied*, 109 S. Ct. 269 (1988); *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), it neglects to cite to any of the many circuit opinions that resoundingly have rejected this abandonment theory. See, e.g., *Stockton v. Virginia*, 852 F.2d 740, 744 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1354 (1989); *United States v. Butler*, 822 F.2d 1191, 1195 n.2 (D.C. Cir. 1987) (listing the Sixth Circuit as the only circuit court that has accepted the

abandonment theory, and citing the Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits as continuing to apply *Remmer*); *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985); *see also United States v. Hornung*, 848 F.2d 1040, 1044 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989); *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985).

Because we find that the government has made an adequate showing to overcome any presumption of prejudice, however, we have no occasion to decide today whether the girlfriend's conduct triggers a *Remmer*-type presumption. In reaching this determination, we have found several factors regarding the incident to have dispositive significance. First, the girlfriend's conduct did not provide any juror, either directly or indirectly, with substantive extra-judicial information going to the question of defendants' guilt or innocence. Courts frequently examine the nature of the information provided through a challenged *ex parte* contact and are more likely to deem the contact harmless if the content of the communication does not pertain to substantive matters involved in the trial. *See, e.g., Butler*, 822 F.2d at 1196; *Sher v. Stoughton*, 666 F.2d 791, 794-95 (2d Cir. 1981). This refutes the defendants' claims of prejudice, because the girlfriend's conduct merely involved her own subjective expressions of fear, rather than furnishing any information touching upon substantive matters at issue in the trial.

Second, we note with approval the immediate and thorough steps taken by the district court to ascertain the

extent of any juror prejudice. The trial court quickly excused the juror whose girlfriend expressed the fear. The court also thoroughly questioned the three jurors who indirectly learned of the girlfriend's fears to determine whether their impartiality had been compromised. These jurors assured the court that their impartiality had not been affected and that they would base their deliberations solely on the evidence introduced at trial.

We can find no fault with the actions taken by the district court and his decision to retain the three jurors in light of their assurances of impartiality. Substantial deference is due the trial court's exercise of its discretion in handling situations involving potential juror bias or misconduct. *See, e.g., United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985); *United States v. Kelly*, 722 F.2d 873, 881 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070 (1984). Because the trial court's determination regarding continued juror impartiality is a question of fact, this enhances the deference due its ultimate finding on the issue. *See, e.g., Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Aiello*, 771 F.2d at 630; *United States v. Williams*, 737 F.2d 594, 612 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

Here, the trial court was persuaded of the three jurors' continued impartiality after individually questioning each one. He properly could rely on their assurances of impartiality, given in response to his questions. *See, e.g., Aiello*, 771 F.2d at 630; *Williams*, 737 F.2d at 612; *Sher*, 666 F.2d at 795. We cannot say the court erred in

declining to dismiss the three jurors challenged by the defendants.

2. *The Bribe Attempt*

There can be little dispute that the juror who was offered the bribe would be presumed, under *Remmer*, to have been prejudiced. This juror, however, was immediately dismissed, and thus our inquiry turns to the four other jurors who learned of the incident. Of these four jurors, two learned of the bribe offer from glimpses of newspaper headlines; the third learned of it from one of the first two, and the fourth overheard two strangers talking, apparently, about the same newspaper coverage. Directly or indirectly, therefore, all four jurors learned of the incident because of the news coverage. Consequently, the most appropriate standard for us to apply in considering this incident is the standard we have articulated in cases where jurors were exposed to potentially prejudicial publicity during the course of trial.

In *United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981), we set forth a three-prong standard for courts to apply to determine whether publicity during the course of a trial has prejudiced the jury. First a court should determine whether the news coverage is prejudicial. Second, if it is, the court should determine whether any jurors were exposed to the coverage. Third, if exposure did occur, the court should examine the exposed jurors to determine if this exposure compromised their impartiality. *See id.* at 757; *see also United States v. Gaggi*, 811 F.2d 47, 51 (2d Cir), *cert. denied*, 482 U.S. 929 (1987). As with *ex parte* contacts, a trial court's finding of continued jury

impartiality despite exposure to news coverage should be upheld absent abuse of discretion. *See Gaggi*, 811 F.2d at 51.

Applying this standard, we reject defendants' challenges to the four jurors. Although there can be no dispute that the jurors were exposed to the news coverage (prong two of the standard), the defendants cannot succeed on the other two prongs of the test. First, we have substantial reservations about whether the minimal news coverage to which the jurors were exposed can truly be deemed prejudicial. The jurors were exposed, directly or indirectly, to no more than a brief newspaper headline reporting that a juror had been approached. They were not exposed to any substantive information about issues at trial or about the defendants' guilt with respect to the charges against them. *See id.* at 52. The coverage also was factually oriented rather than sensational in nature. *See Porcaro*, 648 F.2d at 758.

Furthermore, with respect to the third prong of the standard, we note that the trial court individually questioned each of the four jurors about their continued impartiality and accepted their assurances of impartiality as credible. In light of the prompt action by the trial court, the non-sensational nature of the minimal amounts of coverage to which the jurors were exposed, and the jurors' avowals of continued impartiality, we find that the trial court's retention of the four challenged jurors on the jury was not error. *See United States v. Chang An-Lo*, 851 F.2d 547, 559 (2d Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *Gaggi*, 811 F.2d at 51-53; *see also United States v. Maceo*,

873 F.2d 1, 6 (1st Cir.), *cert. denied*, 110 S. Ct. 125 (1989).

3. *Newspaper Articles in Jury Room*

Defendant's final jury challenge pertains to the incident involving the newspaper articles in the jury room at the outset of the jury's deliberations. As with the bribe attempt, defendants' argument alleges juror exposure to prejudicial news coverage. Thus, *Porcaro's* three element standard governs our consideration of this incident as well.

For essentially the same reasons articulated in our discussion of the bribe attempt coverage, we find that defendants cannot succeed under *Porcaro's* three-prong test. At the outset, we note that prong two has been satisfied: there was juror exposure to news coverage. Specifically, juror #104 admitted to glancing at portions of the articles found in the deliberation room. As with the bribe attempt incident, however, defendants fail on the other two elements of the test. First, we have doubts about whether the articles to which at least juror #104 was exposed were prejudicial within the meaning of the three-prong standard. The articles were factually oriented accounts of incidents allegedly involving certain jurors. They do not appear to have been sensational in nature. Nor did the articles contain extra-judicial substantive information about issues at trial or the defendants' guilt with respect to the charges against them.

In addition, as it did in the other incidents, the district court thoroughly questioned each of the challenged jurors to ascertain the extent of their exposure and their continued ability to judge the defendants impartially. Each juror assured the court of his continued impartiality,

and the court was satisfied with these assurances. In light of the deference due the district court's determinations, we find no error in its retention of the challenged jurors on the jury. *See Chang An-Lo*, 851 F.2d at 559.

IV. TESTIMONIAL AND PROCEDURAL CHALLENGES

Defendants raise a host of challenges regarding various testimonial and procedural issues that arose at trial. We consider each of their contentions.

A. *Expert Witness Testimony*

At trial, the government called FBI Agents Arthur Eberhart and James Nelson to give expert testimony. Eberhart was the government's gambling expert and testified at length as to various defendants' roles in different gambling operations. Nelson gave more general expert testimony on the structure and operations of La Cosa Nostra and also gave his opinion, based on the wiretap tapes, regarding each defendant's role in the criminal organization. Among other things, it was his opinion that Raymond Patriarca was the boss of the Boston-Providence Family of La Cosa Nostra and that Gennaro Angiulo was the underboss.

Defendants raise two objections to this expert testimony. First, they argue that it violated their sixth amendment right to confrontation because the trial court allowed the agents to testify without requiring that they disclose the identity of, or information received from, certain government informants. Second, they contend that permitting the experts to testify as to the defendants' roles in various activities invaded the province of the jury by effectively telling the jury what results to reach.

1. *Nondisclosure of Informant Information*

Defendants raise a two-part challenge to the trial court's failure to require the disclosure of informant information. First, they contend that allowing the FBI agents' testimony without requiring the disclosure of informant information violated Rule 705 of the Federal Rules of Evidence, which states that on cross-examination, an expert witness may be required to disclose the facts and data underlying his opinion.^{4/} Second, defendants argue that their sixth amendment right to confrontation was violated because they could not effectively cross-examine the agents without the disclosure of the informant information.

In *United States v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert. denied*, 109 S. Ct. 314 (1988), we considered and rejected virtually identical arguments raised on appeal after the trial and conviction of Jason Angiulo, Gennaro's son, and various other associates of the Patriarca Family. In that trial, Agent Nelson also gave expert testimony on the operations of La Cosa Nostra and the roles of the defendants in the organization without being required to disclose the identity of informants. We upheld that testimony against sixth amendment and Rule 705 chal-

^{4/} Fed. R. Evid. 705 states:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

lenges on several grounds. First, we noted that the trial court had instructed Nelson not to answer any questions on direct examination that would be based on informant information he could not disclose on cross-examination. Second, we emphasized that Nelson had testified explicitly that his opinions regarding the defendants were based solely on the tapes presented at trial. Finally, we noted that defendants had the opportunity to cross-examine Nelson extensively on his opinions. In those circumstances, we found no error in the trial court's refusal to require the disclosure of informant information. *See id.* at 974.

We find the same reasoning to be dispositive here. The sole distinction between *Angiulo* and the situation before us is that the trial court here did not expressly instruct the expert witnesses not to answer any questions on direct examination that would be based on informant information that could not be disclosed on cross-examination, as had been done in *Angiulo*. This distinction, however, does not require a different result. The experts here gave the same type of testimony that was given in *Angiulo*, stating their opinions as to the roles played by defendants. As in *Angiulo*, the expert testimony was based solely on tape recordings presented at trial. Nelson repeatedly stated, both on direct examination and on cross-examination, that his testimony as to the roles played by the defendants was based only on the taped conversa-

tions that he had reviewed.^{5/} Although it might have been preferable for the trial court explicitly to instruct the experts as had been done in *Angiulo*, it was not reversible error to fail to do so where the experts testified that the opinions given were based only on the tape recordings.

Defendants attempt to distinguish *Angiulo* by pointing to various admissions by the experts that informant information had provided a basis for certain of their conclusions. We have carefully reviewed the relevant portions of the record and find that the experts testified only that information from past cooperating witnesses had contributed to their knowledge about La Cosa Nostra in general. Phrased another way, the experts acknowledged that information gleaned from informants over the course of their FBI careers was part of the vast mix of material that contributed to their background expertise on La Cosa Nostra. This expertise, in turn, enabled them to listen to the tapes and form opinions on defendants' criminal activities. The fact that informant information furnished

^{5/} For example, during the cross-examination of Nelson, the following exchange took place:

Q: Is your opinion as to the roles of these and other individuals based upon the taped conversations which you have reviewed?

A: Yes.

On further cross-examination:

Q: And in connection with the opinions which you have given in this particular case, what was the basis of those opinions?

A: The basis was the tapes themselves.

some part of the experts' background knowledge does not implicate the sixth amendment. Regardless of the information that contributed to their background expertise, the experts' testimony regarding the particular charges against these defendants was based solely on an analysis of the tape recordings. We find no error in the trial court's failure to require the disclosure of informant information.^{6/}

2. *Invasion of the Jury's Province*

Defendant Granito, joined by Gennaro Angiulo, raises an additional objection to the expert testimony. Specifically, Granito challenges Agent Eberhart's testimony regarding the roles played by various defendants in the North Margin Street poker operation - in particular, Eberhart's testimony that, based on his analysis of the tape recordings, it was his opinion that Granito was a "partner" in the poker game.^{7/}

Granito contends that Eberhart's expert testimony should have been limited to a description of the general

^{6/} We note, parenthetically, that any background role played by informant information in this case can be no different than the role played by informant information in *Angiulo*. The factors underlying Agent Nelson's expertise on La Cosa Nostra have not changed. Thus, we do not find that defendant have isolated any distinction from *Angiulo*, and for the reasons previously discussed, we conclude that its holding governs here.

^{7/} The testimony was as follows:

Q: [W]ith respect to Samuel Granito, what, if any, role did he have in the poker game?

A: He was a partner in the poker game.

operation of gambling businesses and an explanation of any specialized terminology appearing on the tapes. With such testimony as background, the jury would have been more than competent to determine for itself the nature of Granito's involvement. In letting the expert state his opinion regarding Granito's role, the trial court impermissibly allowed the expert to give a legal conclusion and effectively tell the jury what result to reach, argues the defendant.

We disagree. The permissible scope of expert testimony under Fed. R. Evid. 702 is quite broad,^{8/} and encompasses an expert's statement of opinion on an ultimate fact at issue. See, e.g., *United States v. Lamattina*, 889 F.2d 1191, 1193-94 (1st Cir. 1989); *United States v. Theodoropoulos*, 866 F.2d 587, 591 (3d Cir.), *mandamus denied*, 109 S. Ct. 1179 (1989). The only significant limitation is that the expert opinion be helpful to the trier of fact. See *Theodoropoulos*, 866 F.2d at 591. Furthermore, the trial court has wide discretion in determining whether to admit expert testimony under this standard. See *Lamattina*, 889 F.2d at 1194.

Applying these principles to the facts at hand, we

^{8/} Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

find that the trial court committed no error in allowing the expert to give his opinion as to the defendant's role in the criminal activities at issue here. We recently have upheld similar expert testimony in closely analogous circumstances. In *United States v. Lamattina*, we found no error in allowing an expert witness to testify that, after listening to the government's recorded conversation involving the defendant, it was his opinion that the conversation pertained to a loansharking transaction. See *Lamattina*, 889 F.2d at 1193-94. Similarly, in *United States v. Angiulo*, we found no error in allowing an expert to testify that, after listening to the government's tapes, it was his opinion that the defendants were "close associates" of the Patriarca Family. See *Angiulo*, 847 F.2d at 973-75. In both cases, we reasoned that the testimony was helpful to the jury in determining the meaning and significance of recorded conversations and the criminal jargon used in them. See *Lamattina*, 889 F.2d at 1194. We noted in *Angiulo* that, although this type of testimony posed some risk of prejudicing the defendants, it was particularly helpful in assisting the jury to understand the often complex structure of organized crime activities. See *Angiulo*, 847 F.2d at 975; see also *Theodoropoulos*, 866 F.2d at 592.

The same reasoning is equally applicable here. Given the extensive criminal organization controlled by the Patriarca Family, the complexity of the interrelationships within the organization, and the use of criminal jargon by defendants in their conversations, we cannot find that the district court abused its discretion in permitting expert testimony as to defendants' roles in certain activi-

ties on the ground that such testimony would be helpful to the jury. As we did in *Angiulo*, we acknowledge that some risk exists that this type of testimony will be overly persuasive to the jury. We note with approval, however, that the trial court explicitly instructed the jury that it could accept or reject the expert testimony in whole or in part. Cf. *Theodoropoulos*, 866 F.2d at 592 (approving of a similar jury instruction). Considering the matter in its entirety, there was no error here.

B. *Refusal of Immunity*

Defendants' next claim of error pertains to the extortionate credit transaction involving a \$200,000 loan to Joseph Palladino. To counter the government's evidence relating to this transaction, defendants intended to introduce the testimony of the alleged victim, Joseph Palladino, that he was not a loansharking victim at all, but rather a party to a legitimate business transaction with the defendants. Before calling Palladino to the stand, the defense moved to limit the government's cross-examination of Palladino to the subject of his intended direct examination - his alleged status as a loanshark victim. The motion informed the court that Palladino would assert his fifth amendment privilege in response to all other areas of inquiry. When this motion was denied, defendants then moved for judicial immunity for Palladino, claiming that he possessed exculpatory information and would not testify in the absence of immunity for fear of future prosecution. This motion also was denied, and Palladino did not testify. Defendants argue that the trial court's failure to order

immunity denied them a fair trial on the count alleging the \$200,000 extortionate loan to Palladino.

The government's response to this contention is simply that the trial court lacked the authority to grant or order use immunity for Palladino. We find this response inadequate to refute defendants' contentions on the immunity issue. Although it is clear that the district court lacked authority to grant immunity itself under the use immunity *statute*, 18 U.S.C. § 6003(b), *see United States v. Doe*, 465 U.S. 605, 616-17 (1984); *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), it is a more difficult question whether the trial court had power, on fifth or sixth amendment grounds, to require a grant of immunity if the defendants' constitutional rights were being violated by the government's refusal to provide immunity.

A number of our sister circuits have considered this question, and two theories have emerged under which defendants would be entitled to a grant of immunity for prospective witnesses. The first theory, accepted in only a small minority of cases, can be labeled the "effective defense" theory; it holds that a court has the inherent power to immunize witnesses whose testimony is essential to an effective defense. The second theory, accepted by a number of circuits, can be called the "prosecutorial misconduct" theory; it holds that a court has the power to order the government to grant statutory immunity to a witness (or face a judgment of acquittal) where there exists prosecutorial misconduct arising from the government's deliberate intent to distort the fact-finding process. *See, e.g., United States v. Pennell*, 737 F.2d 521, 526 (6th

Cir. 1984) (describing the two theories), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Turkish*, 623 F.2d 769, 773 (2d Cir. 1980) (same), *cert. denied*, 449 U.S. 1077 (1981); *see also United States v. Hooks*, 848 F.2d 785, 803 (7th Cir. 1988). In prior cases, we have acknowledged briefly the existence of these two theories, but have not discussed them in much depth, due to the defendants' clear failure to satisfy the requirements of either theory. *See United States v. Drape*, 668 F.2d 22, 26-27 (1st Cir. 1982); *United States v. Davis*, 623 F.2d 188, 193 (1st Cir. 1980). Defendants' allegations in this case warrant our examination of the theories in greater detail.

1. *Effective Defense Theory*

The effective defense theory was articulated by the Third Circuit in *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) and holds that:

when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial.

Id. at 974. Under this theory, the court itself has the inherent power to grant immunity. The power is grounded in a defendant's due process right to have exculpatory evidence presented to the jury. *See id.* at 969 *et seq.*

This theory has been rejected by virtually every other court that has considered the issue. *See, e.g., United*

States v. Paris, 827 F.2d 395, 399 (9th Cir. 1987); *United States v. Tindle*, 808 F.2d 319, 325 n.4 (4th Cir. 1986) (noting that the effective defense theory has been soundly criticized and is clearly the minority view, and citing cases); *United States v. Sawyer*, 799 F.2d 1494, 1506 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987); *Pennell*, 737 F.2d at 527; *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Turkish*, 623 F.2d at 775-77. One of the most frequent rationales articulated in opposition to the theory is that it would pose separation of power problems for courts to assume inherent authority to grant judicial immunity themselves. The rationale is that the power to grant witness immunity is of legislative origin, and was granted to the executive branch. For the judiciary to exercise this power in the absence of a legislative grant would violate separation of power principles. *See, e.g., Pennell*, 737 F.2d at 527; *see also Mendia*, 731 F.2d at 1414. In addition to separation of power difficulties, those critical of the theory have articulated certain practical considerations that militate against courts' assuming the power to grant immunity to witnesses who possess exculpatory information. The Second Circuit has observed that acceptance of the effective defense theory would force judges to balance a defendant's need for particular witnesses against the prosecutor's reasons for not seeking immunity for the witnesses herself - an exercise not well-suited for judicial decisionmaking. *See Turkish*, 623 F.2d at 775-77; *see also Pennell*, 737 F.2d at 527-28 (articulating additional practical considerations).

We find these arguments to have considerable force and accordingly have substantial reservations about the effective defense theory. Even, however, if we accepted the theory as articulated by the Third Circuit in *Government of Virgin Islands v. Smith*, 615 F.2d 964, the defendants here would not satisfy its requirements. The Third Circuit stated in *Smith* that before a court should invoke any inherent power to grant immunity, it must be found that the prospective witness would offer clearly exculpatory and essential testimony *and* that the government has no strong interest in withholding immunity. *See id.* at 974. Accepting, for the sake of discussion only, that Palladino would have offered essential and exculpatory testimony, the defendants' immunity argument falls under the second requirement. Unlike in *Smith*, the government here *has* presented a number of significant reasons for withholding immunity. Specifically, the government has indicated a desire not to hinder possible future prosecutions of Palladino for alleged involvement in other organized crime activities, for a variety of likely tax violations, and for probable violations of state laws. These reasons certainly are adequate to constitute a strong governmental interest in withholding immunity. We therefore reject defendants' contentions under the effective defense theory.

2. *Prosecutorial Misconduct Theory*

Despite the nearly universal rejection of the effective defense theory, courts have held that the due process clause does constrain the prosecutor to a certain extent in her decision to grant or not to grant immunity. If a prosecutor abuses her discretion by intentionally

attempting to distort the fact-finding process, then a due process violation exists and a court may order the prosecutor to grant immunity or face a judgment of acquittal. See *United States v. Hooks*, 848 F.2d 785, 799 (7th Cir. 1988).

Such intentional distortion could occur in two ways. First, the government could intimidate or harass potential defense witnesses to discourage them from testifying - for example, by threatening them with prosecution for perjury or other offenses. Where such intimidation tactics cause a potential witness to invoke the fifth amendment and withhold testimony that otherwise would have been available to the defendant, a court may order the prosecutor to grant immunity to the witness or face a judgment of acquittal. See, e.g., *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir.), *cert. denied*, 109 S. Ct. 174 (1988); *Hooks*, 848 F.2d at 799; *United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983); *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976). Cf. *Webb v. Texas*, 409 U.S. 95, 98 (1972) (holding that a judge's lengthy perjury warnings to a defense witness effectively drove the witness off the stand, thereby denying the defendant his due process right to present his defense). Second, the government could intentionally distort the fact-finding process by deliberately withholding immunity from certain prospective defense witnesses for the purpose of keeping exculpatory evidence from the jury. See *Hooks*, 848 F.2d at 802; *Government of the Virgin Islands v. Smith*, 615 F.2d at 968; see also *Pennell*, 737 F.2d at 526; *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174

(1983).

We find that the defendants have failed to make an adequate showing of either type of prosecutorial misconduct. With respect to their claims of governmental intimidation, the defendants have pointed to four instances of alleged prosecutorial misconduct: (1) the government's informing the court that it thought Palladino would lie if he testified; (2) the government's transmission of pertinent information on Palladino to the Internal Revenue Service's (IRS) Criminal Division; (3) the government's recital to the court of the criminal activities of which Palladino was suspected; and (4) the notification given to Palladino by the Internal Revenue Service that he was under investigation for possible tax violations.

None of this conduct is sufficient to warrant a finding of witness intimidation by the prosecution. The government arguably was justified in telling the court it thought Palladino would lie and in detailing his suspected criminal activities to explain its reasons for not granting him immunity. In addition, it is difficult to see how these communications could be deemed an intimidation of the witness when they were made to the court. Neither can we fault the prosecution's transmission of information to the IRS. The defendants have not shown that it is anything but a routine practice for one investigatory arm of government to forward information to other arms that also have an interest in the information. Finally, we cannot hold the prosecution liable for the actions of the IRS in choosing to notify Palladino that he was under investigation for suspected tax violations. There has been

no indication whatsoever that the prosecution suggested to the IRS that it contact Palladino, or that the prosecution even knew of the contact in advance.

Furthermore, the conduct complained of by defendants here falls far short of the type of prosecutorial conduct condemned by other courts as witness intimidation. For example, in *United States v. Morrison*, 535 F.2d 223, the prosecutor on at least three occasions had sent messages to a prospective defense witness warning her that she was liable to prosecution on drug charges; that if she testified, the testimony could be used as evidence against her; and that if she lied, federal perjury charges could be brought. The prosecutor then subpoenaed the witness to his office and again warned her, in the presence of three law enforcement officers, of the risks of testifying. After these warnings, the witness took the stand and repeatedly invoked her privilege against self-incrimination. *See id.* at 225-26; *see also Lord*, 711 F.2d at 891-92. The defendants here have not pointed to any prosecutor-witness communication that even remotely approaches the conduct involved in *Morrison*. Indeed, the defendants have not pointed to any direct communication between the prosecution and Palladino at all. Nor have the defendants established the requisite causal nexus between the government's conduct and Palladino's decision not to testify. *See United States v. Hoffman*, 832 F.2d 1299, 1303-05 (1st Cir. 1987). Given these circumstances, we find that defendants have failed to make a showing of governmental intimidation.

We also find no indication that the prosecution

intentionally distorted the fact-finding process by deliberately withholding immunity from Palladino for the purpose of keeping his exculpatory testimony from the jury. The government gave several reasons for its objection to the immunization of Palladino, including its desire not to hinder possible state and federal prosecutions of Palladino for his suspected involvement in other criminal activities. These reasons clearly show that the government's conduct was motivated by something other than the sole desire to keep Palladino's exculpatory testimony from the jury. Accordingly, we reject defendants' prosecutorial misconduct theory, and find no error in the government's failure to offer immunity to Joseph Palladino.

C. *Admission of Government Pleadings*

Defendants object to the admission at trial of certain pretrial government motions to unseal and reseal tape recordings. To understand the defendants' objection, it is necessary first to review the underlying factual context.

In his opening statement to the jury, counsel for Francesco Angiulo challenged the government's handling of the wiretap tapes, suggesting that the procedures by which the tapes were handled did not adequately ensure their protection from tampering, and insinuating that the tapes very well may have been tampered with by the government. He acknowledged that the government had taken steps to seal the original recordings, but then noted that the tapes had been unsealed and resealed for various reasons, thereby creating the opportunity for alteration. Defense counsel even went so far as to suggest that

government attorneys had misled the court on certain occasions when requesting that particular tapes be unsealed and resealed. The purpose of these statements obviously was to cast doubt on the integrity of the tape recordings that formed the heart of the government's case.

To respond to these assertions, the government elaborately laid out, through testimony and documentation, the procedures by which the tapes were handled. Included in the documentation were certain pretrial motions that had been filed by the government to unseal and reseal tape recordings. The motions were introduced and allowed in evidence not for the truth of the matters asserted, but rather to establish the reasons the government had articulated to the court in its requests for unsealing and resealing, and when these reasons had been stated. Put another way, the government was not offering the motions to prove that it had been truthful in the reasons it had given to the court for unsealing and resealing the tape recordings; rather, it was seeking only to show what the motions had stated and when they had been filed. The jury was explicitly instructed to this effect - that it was not to consider the motions for the truth of the matters asserted.

Defendants objected to the admission of the motions at trial, and they reiterate their objections on appeal. They argue that because the motions contained factual assertions made by government attorneys under oath, the admission of the motions at trial caused the government attorneys effectively to become witnesses on disputed factual issues. In particular, defendants object to

the assertion made in one motion by the lead prosecutor that the integrity of the tapes had been maintained. Invoking the prohibition against an attorney's serving as both advocate and witness, defendants contend that once the motions were admitted, the lead prosecutor should either have been disqualified or subjected to cross-examination on his sworn statements contained in the admitted motions. The trial court's failure to require either, according to defendants, is reversible error.

Defendants' arguments can be dispensed with fairly quickly. We acknowledge the existence of the advocate-witness rule, which generally "bars an attorney from appearing as both an advocate and a witness in the same litigation." *United States v. LaRouche Campaign*, 695 F.Supp. 1290, 1315 (D. Mass. 1988). We are also aware that where an attorney improperly appears as both an advocate and a witness in the same litigation, the sanction of reversal and a new trial *may* be justified. *See United States v. Birdman*, 602 F.2d 547, 556-60 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980).^{2/}

That situation, however, does not confront us here. We find it highly significant that the motions to unseal and reseal were *not* admitted for the truth of the matters asserted, and that the jury explicitly was instructed to this effect. It follows that if the assertions made by government attorneys were not introduced for their truth, then the attorneys cannot be considered to have become

^{2/} Reversal is not always required, however, *See Birdman*, 602 F.2d at 559-60.

witnesses, and there was no violation of the advocate-witness rule. Because defendants have articulated no other compelling need to justify calling the lead prosecutor as a witness, *see United States v. Prantil*, 764 F.2d 548, 551-54 (9th Cir. 1985); *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), we find no error in the trial court's failure either to disqualify the lead prosecutor or require him to submit to cross-examination.

D. *Severance*

Defendant Gennaro Angiulo raises the final procedural challenge, contending that the trial court erred in denying his motion to be severed from the trial of Granito due to antagonistic defenses.^{10/} To address this issue, it is again necessary to review the underlying factual context.

Granito was charged with: (1) conspiring to murder Angelo Patrizzi, and (2) owning and operating an illegal gambling business (the North Margin Street poker games).^{11/} The government's evidence against Granito consisted of tape-recorded conversations in which, *inter alia*, Granito discussed with Gennaro prior unsuccessful attempts to kill Patrizzi, and also inquired as to the

^{10/} Francesco Angiulo joins in this argument insofar as it pertains to his conviction for operating the North Margin Street poker games.

^{11/} Granito also was charged with being an accessory before the fact to the murder of Patrizzi, but discussion of this charge is not necessary to the resolution of the severance issue.

division of profits from the North Margin Street poker game. In defense to these charges, Granito argued that he had withdrawn from any conspiracy to murder Patrizzi and that he had inquired about the poker game proceeds, not for himself, but as a favor for an individual named Nicola Giso.

- Gennaro also was charged with these offenses. The government's evidence against him consisted of the same tape recordings introduced against Granito, as well as some others. Gennaro's defense to the charges, consistent with his defense to virtually all of the charges, was a combination of two arguments: (1) that the tapes were unintelligible, and (2) that there was insufficient evidence to prove his guilt beyond a reasonable doubt. Gennaro contends that these defenses were antagonistic to those of Granito, and as a result, the trial court erred in denying his motion to sever. We are not persuaded.

A motion for severance is addressed to the discretion of the trial court, and the court's denial of such motion will be overturned only when there has been a clear abuse of discretion. *See, e.g., United States v. Drougas*, 748 F.2d 8, 18 (1st Cir. 1984); *United States v. Arruda*, 715 F.2d 671, 679 (1st Cir. 1983); *United States v. Davis*, 623 F.2d 188, 194 (1st Cir. 1980). Furthermore, "[a]ntagonism of defenses requires severance only where the defenses are so inconsistent that the jury would have to believe one defendant at the expense of the other; the conflict alone establishes the guilt of a defendant." *Drougas*, 748 F.2d at 20 (quoting *Arruda*, 715 F.2d at 679). It is not enough that the defendants are hostile, casting

blame on one another; the antagonism in defenses must be such that if the jury believes one defense, it is compelled to convict the other defendant. *See id.* at 19; *Arruda*, 715 F.2d at 679; *see also United States v. Porter*, 764 F.2d 1, 13 (1st Cir. 1985); *United States v. Talavera*, 668 F.2d 625, 630 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *Davis*, 623 F.2d at 194-95.

Applying these standards to the facts at hand, we find that Gennaro and Granito's defenses were insufficiently antagonistic to require severance. Granito's theory of defense was simply that he had withdrawn or was not involved in the crimes charged. We recognize that this theory did not always mesh perfectly with Gennaro's defense. Thus, while Gennaro argued that conversations on certain crucial tapes were unintelligible, Granito chose not to challenge the tapes but rather focused on furnishing innocent explanations for the conversations attributed to him by the government. Furthermore, some of Granito's explanations could have been accepted by the jury as compatible with a determination that Gennaro was guilty on the offenses charged. For example, Granito's explanation that he inquired about the poker game proceeds only as a favor for Nicola Giso could have been accepted by the jury as compatible with a determination that Gennaro was in charge of the poker games. But this does not make the defenses antagonistic. To conclude that defenses are antagonistic, we must find that the jury's belief of one defendant's theory necessarily *compels* a finding that the other defendant is guilty. This is not the situation here. The jury could have believed that Granito withdrew from

the murder conspiracy and never participated in the gambling enterprise without being compelled to find Gennaro guilty of these offenses. Phrased another way, the jury could have believed Granito's withdrawal/noninvolvement defense while also accepting Gennaro's contention that there was insufficient evidence to convict him. Thus, no antagonistic defenses existed sufficient to require severance.

We are supported in this conclusion by prior cases in which we have denied severance despite the presence of even more sharply antagonistic defense theories than are involved here. In *United States v. Arruda*, 715 F.2d 671, we found no sufficiently antagonistic defenses even though one defendant's theory consisted of blaming his co-defendant for the crime while proclaiming his own innocence. In declining to require severance, we stated that the first defendant's theory "consisted of nothing more than fingerpointing and tattling, which does not justify severance." *Id.* at 679. Similarly, in *United States v. Luciano Pacheco*, 794 F.2d 7 (1st Cir. 1986), we again rejected a claim of antagonistic defenses where one defendant's theory consisted explicitly of blaming his two co-defendants. *See id.* at 9-10. Granito's defense and Gennaro's defense did not even reach this level of antagonism. Accordingly, we reject defendant's severance argument.

V. SUFFICIENCY OF THE EVIDENCE

Granito raises two challenges to the sufficiency of the evidence supporting his convictions. The first involves the evidence regarding the Patrizzi murder; the second

pertains to the North Margin Street poker games.

A. *The Patrizzi Murder*

Granito contends that insufficient evidence existed to prove that he was an accessory before the fact to the murder of Angelo Patrizzi and therefore his two RICO convictions must be overturned. To understand the reasoning behind this argument, as well as our analysis of it, it is necessary to review the nature of the charges against Granito and the form of the jury's verdict.

The indictment charged Granito with two RICO counts, under 18 U.S.C. §1962(d) and (c) respectively, as well as with one substantive gambling violation, under 18 U.S.C. §1955. The two RICO counts, in turn, charged Granito with the commission of three predicate acts: (1) conspiring to murder Patrizzi; (2) being an accessory before the fact to the murder of Patrizzi by inciting, procuring, counseling, hiring and commanding Frederick Simone^{12/} and others to commit the murder; and (3) owning and operating an illegal gambling business (the North Margin Street poker games). This last predicate act corresponded to the substantive gambling count charged separately against Granito under 18 U.S.C. §1955. In explaining these charges to the jury, the trial court set forth the legal elements the jury had to find to convict on each of the alleged criminal acts. The court also explicitly

^{12/} The indictment described Simone as an unindicted co-conspirator in the murder of Patrizzi. Simone's role in the murder was described briefly in our initial discussion of the facts, and will be discussed in greater detail below.

instructed the jury that as a prerequisite to finding Granito guilty of being an accessory before the fact to the murder of Patrizzi, "you must first find that Frederick Simone actually committed or was otherwise a principal in the commission of the murder of Angelo Patrizzi."

The jury returned a general verdict finding Granito guilty on both of the RICO counts, thereby necessarily finding him guilty on at least two of the three predicate acts charged.^{13/} The jury also found Granito guilty on the substantive gambling count that had been charged separately.

Granito's argument on appeal is that there was insufficient evidence to support the accessory charge. More specifically, he contends that insufficient evidence existed to find that Simone was a principal in the Patrizzi murder, and thus, under the judge's instruction, the jury could not have found that he was an accessory. As a result, he posits that his RICO convictions must be overturned because the general nature of the verdict makes it impossible to know whether the jury relied on the insufficient accessory charge as one of two predicate acts it found under RICO. Put another way, Granito argues that the insufficiency of the evidence regarding the accessory charge requires the overturning of his RICO convictions, because the jury may have found only two predicate acts, and we are unable to rule out the possibili-

^{13/} Under RICO, at least two predicate acts are needed to constitute a pattern of racketeering activity. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

ty that the accessory charge was one of these.

The government's first response to these arguments is that, regardless of the jury instruction, the indictment charged Granito with procuring or counseling Simone *and others* to commit the murder of Patrizzi, and thus it is not required that Simone in particular be found a principal in order to find Granito an accessory. Second, the government argues that even if Simone must be found to have been a principal, there is sufficient evidence to support this finding. Finally, the government contends in the alternative that even if there is insufficient evidence on the accessory charge, Granito's RICO convictions need not be overturned. We consider each of these issues in turn.

In reviewing the sufficiency of the evidence, we conclude that we *are* bound by the trial court's instruction to the jury that Simone must be found a principal in order to convict Granito as an accessory. The instruction was not legally incorrect, and once it was given, it became the law of the case. *See, e.g., United States v. Killip*, 819 F.2d 1542, 1547-48 (10th Cir.), *cert. denied*, 484 U.S. 865 (1987); *United States v. Tapio*, 634 F.2d 1092, 1094 (8th Cir. 1980); *see also Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.), *cert. denied*, 1099 S. Ct. 392 (1988); *Milone v. Mocerri Family, Inc.*, 847 F.2d 35, 38-39 (1st Cir. 1988). If we were to treat the instruction otherwise, and conclude that Granito could be deemed an accessory without finding Simone to have been a principal, we would be sustaining a conviction on appeal on a theory upon which the jury was not instructed below. This we

cannot do. See *United States v. Hill*, 835 F.2d 759, 764 n.7 (10th Cir. 1987); *Cola v. Reardon*, 787 F.2d 681, 696 (1st Cir.), *cert. denied*, 479 U.S. 930 (1986).

The issue therefore becomes whether the government introduced sufficient evidence to prove beyond a reasonable doubt that Simone was a principal in the murder of Patrizzi. Our review of the evidence must be made in light most favorable to the government, drawing all legitimate inferences and resolving all credibility determinations in favor of the verdict. See, e.g., *United States v. Machor*, 870 F.2d 945, 948 (1st Cir. 1989); *United States v. Winter*, 663 F.2d 1120, 1127 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

Applying this standard to the facts, we conclude that the evidence was not sufficient to find beyond a reasonable doubt that Simone was a principal in the murder of Patrizzi. It therefore follows that there was insufficient evidence to support a finding that Granito was an accessory before the fact.

The evidence introduced by the government at trial consisted primarily of taped conversations. This evidence indicated that Gennaro Angiulo, Samuel Granito, and others were concerned that Patrizzi might be seeking revenge against Frederick Simone and Cono Frizzi, two Boston members of the Patriarca Family, for the 1978 murder of his half-brother, Joe Porter. It was therefore decided that Patrizzi be killed before he killed either Simone or Frizzi. As evidence of the plans to kill Patrizzi, the government introduced a tape of a March 11, 1981 conversation between Granito, Simone and Gennaro

Angiulo in which Granito and Simone related prior unsuccessful attempts to commit the murder. Granito told Gennaro: "We had him ready last Friday. . . . We had a place. We're gonna take him in a house and strangle him." Simone further explained that he was going to take Patrizzi for a car ride and "[w]e were gonna kill him in the Club."

In the course of this March 11 conversation, Gennaro indicated that he would assist in the effort to find and kill Patrizzi. The next day, in a conversation with Ilario Zannino that also was taped, Gennaro enlisted the assistance of Zannino as well: "Therefore you and I are going to solve a problem here. Not because we want to do it, because it's our fuckin duty to"

The day after this conversation with Zannino, on March 13, Patrizzi disappeared. His decomposed body was found in the trunk of a stolen car on June 11, 1981. As best as could be determined, he had been dead several weeks, and possibly as long as several months.

The strongest evidence introduced by the government to prove the identities of those responsible for the commission of the murder - and, in particular, to prove that Simone was a principal in the murder - consisted of an April 3, 1981 conversation between Zannino and John Cincotti and Ralph Lamattina, two members of the Patriarca Family. Because of the importance of this conversation to the government's case, we reproduce

pertinent portions of the transcript:^{14/}

Ilario Zannino: Shh. Now shh. Johnny I told you didn't I.

John Cincotti: Yeah.

Ilario Zannino: About Joe Porter's brother? [e.g., Angelo Patrizzi].

John Cincotti: No.

Ilario Zannino: Well they clipped him

Ralph Lamattina: Oh, that's it.

Ilario Zannino: Don't say a fuckin word now.

John Cincotti: Did they find him?

Ilario Zannino: No, they didn't find him. They put him in his trunk. . . . Nine of them. Nine of them. They lugged him from the fuckin Topcoat. Nine fuckin guys. . . . He went in for a top coat. And nine of them did it. Sonny did. Sonny Boy. You know all the fuckin camurist [trouble makers]. And he's in his trunk. . . . the super Boss had told me on the QT. Jerry says, "I gotta tell you something. . . . They

^{14/} Granito has raised several challenges to the admissibility of this conversation against him. We need not consider these challenges due to our conclusion that even if the conversation is admissible against Granito, the evidence still is insufficient.

clipped Joe Porter's brother."
... "Larry, listen to me now."
"Listen what?" He says, "got
him in his fuckin trunk." ...

Ralph Lamattina: It's been ten days.

Ilario Zannino: But they got him. They got
him. Freddy [e.g., Simone]
was scared to death. The kid
would have clipped him in
two fuckin minutes.

Ralph Lamattina: He wanted to clip Freddy.
The kid wanted to ahh.

Ilario Zannino: Freddy fucked him in the ass.

Even viewing this conversation in the light most favorable to the government, and drawing all legitimate inferences from it, we find the evidence insufficient to prove beyond a reasonable doubt that Simone actually committed, or was a principal in the commission of, the murder of Patrizzi. The conversation establishes only that nine men, including a "Sonny Boy," carried Patrizzi from some place called the "Topcoat," killed him and put him in the trunk of a car. The sole possible reference that could be taken to indicate that Frederick Simone participated as a principal in the murder is that statement by Zannino that "Freddy fucked him in the ass." We assume that this is not to be taken literally but are not sure what it connotes. The most we can legitimately infer is that Patrizzi was killed before he could kill Simone and Frizzi. Whether Simone participated in the actual murder is wholly unclear from the evidence. Indeed, if Simone had

participated, it is puzzling why Zannino would refer only to "Sonny Boy" by name as one of the nine men at the scene, and not mention Simone as well.

We are supported in our conclusion by an examination of other cases in which Massachusetts courts^{15/} have found the evidence insufficient to support murder convictions, despite arguably stronger evidence than existed here. In *Commonwealth v. Mazza*, 504 N.E.2d 630 (Mass. 1987), the victim was found murdered in his jeep in a motel parking lot. Evidence introduced by the prosecution placed the defendant at the parking lot at the approximate time of the killing. The defendant also had a motive (a dispute over a woman) and fled the region after the killing. Still, the court deemed the evidence insufficient to support a conviction for first degree murder, holding that to find the defendant guilty on these facts would require the impermissible piling of inference upon inference. See *id.* at 631-33; see also *Commonwealth v. Salemme*, 481 N.E.2d 471, 475-76 (Mass. 1985). To find Simone guilty as a principal in the murder of Patrizzi on the evidence introduced here likewise would require the impermissible piling of inference upon inference. Accordingly, we deem the evidence insufficient as to Simone, and thus find it insufficient to convict Granito as an accessory.

The question now is whether the general nature of

^{15/} We rely on Massachusetts cases because the predicate crimes of conspiracy to murder and accessory before the fact to murder are state offenses to which the substantive law of the Commonwealth applies.

the jury's RICO verdict requires that we overturn Granito's RICO convictions as well. The answer to this depends on whether we can conclude with certainty that the jury found that Granito committed two sufficient predicate acts. We can clearly conclude that one predicate act found by the jury was the gambling charge relating to the North Margin Street poker games, because Granito was convicted, under 18 U.S.C. §1955, on the substantive gambling count corresponding to this predicate act. See *Brennan v. United States*, 867 F.2d 111, 114-15 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987). Given the proof of this predicate act, to convict Granito on the RICO counts the jury then had to find at least one more predicate act. It must have found Granito guilty of conspiracy, or accessory, or both.^{16/} If the jury found Granito guilty of conspiracy, then the RICO convictions would be valid. Granito has not and, from our review of the evidence, could not challenge the sufficiency of the

^{16/} Conspiracy and accessory are two distinct offenses. That someone may have satisfied all the elements of conspiracy does not necessarily mean that he has satisfied all the elements of accessory. See *Commonwealth v. Perry*, 256 N.E.2d 745, 757 (Mass. 1970). To be found an accessory, one must counsel, hire, or procure a felony to be committed. This "means something more than mere acquiescence but does not require physical participation, if there is association with the venture and any significant participation in it." *Commonwealth v. French*, 259 N.E.2d 195, 222 (Mass. 1970), vacated on other grounds, 408 U.S. 936 (1972). To prove a conspiracy, one must only show the "formation of an unlawful agreement or combination." See, e.g., *Commonwealth v. Cantres*, 540 N.E.2d 149, 153 (Mass. 1989); *Commonwealth v. Pero*, 524 N.E.2d 63, 65 (Mass. 1988).

evidence on conspiracy. The difficult question is: does the insufficiency of the evidence on accessory, combined with the uncertainty as to whether the jury relied on accessory rather than conspiracy in finding two predicate acts, require the overturning of Granito's RICO convictions?

In answering this question, we begin with the general rule that: "'a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.'" *United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 881 (1983)). Courts have applied this general rule in the RICO context to vacate RICO convictions where some of the predicate acts charged were insufficient and it could not be determined whether the jury relied on the invalid predicate acts in reaching their convictions. See *United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir. 1988); *Kragness*, 830 F.2d at 861; *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States v. Riccobene*, 709 F.2d 214, 227 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

In *United States v. Ochs*, however, we noted that an exception to this rule has emerged "where uncertainty as to the ground upon which the jury relied can be eliminated." *Ochs*, 842 F.2d at 520. We observed that the uncertainty could be eliminated in two situations:

[1] where a verdict based on any ground would mean that the jury found every element necessary to support a conviction on

the sufficient ground; or [2] where extrinsic factors in the record make it clear that, although the jury could have relied on an insufficient ground, it did not, in fact, do so.

Id. (citations omitted).

The government invokes the first element of this exception. It argues that reversal of Granito's RICO convictions is not required because, given the facts underlying the charges as well as the nature of the charges, if the jury did convict Granito on the accessory charge, which we deemed insufficient, they also must have convicted him on the conspiracy charge, which *would* be sufficient as the second predicate act.

We agree. Granito's entire argument has as its premise that the jury may have found him guilty on accessory, but not on conspiracy. Under this scenario, his RICO conviction would fall, due to the insufficiency of the accessory charge as a second predicate act. We reject this argument. We find that the jury could not have found Granito guilty as an accessory without also finding every element necessary to convict him on conspiracy. If the jury convicted Granito as an accessory, by finding that Simone was a principal in the Patrizzi murder and that Granito had incited, procured, counseled, hired and commanded Simone to commit the murder, they must necessarily have accepted the government's interpretation of the pertinent tape-recorded conversations involving Simone, Granito, Gennaro Angiulo, and Zannino. These same conversations, and virtually the same government interpretation, were at the heart of the conspiracy charge

against Granito, which alleged that Granito had conspired with Zannino, Simone, and Gennaro Angiulo to kill Patrizzi. This charge was supported by sufficient evidence. Because the facts and the elements underlying the two charges were so intertwined, if the jury found Granito guilty as an accessory, they must also have found him guilty of conspiracy. Thus, even though we have found that the accessory charge is insufficiently supported by the evidence and therefore invalid as a predicate act, the nature of the charges and the evidence underlying those charges establishes that the jury necessarily must have found Granito guilty of conspiracy and thus must have found two valid predicate RICO acts. See, e.g., *United States v. Corona*, 885 F.2d 766, 774-75 (11th Cir. 1989); *United States v. Kato*, 878 F.2d 267, 270 (9th Cir. 1989); *United States v. Doherty*, 867 F.2d 47, 57-60 (1st Cir.), cert. denied, 109 S. Ct. 3243 (1989); *United States v. Odom*, 858 F.2d 664, 666 n.1 (11th Cir. 1988); *United States v. Jacobs*, 475 F.2d 270, 283-84 (2d Cir.), cert. denied, 414 U.S. 821 (1973). Accordingly, there is no uncertainty in the verdict and we uphold Granito's RICO convictions.^{17/}

B. *North Margin Street Poker Games*

Granito also challenges the sufficiency of the

^{17/} Gennaro Angiulo joined in this argument by Granito, claiming that his RICO convictions must be overturned due to the insufficiency of the evidence on the accessory charge. We may quickly dispense with this claim. Gennaro was convicted on a number of separately charged substantive counts that corresponded with predicate acts alleged against him under RICO. As a result, there can be no question that the jury found more than two valid predicate acts.

evidence supporting his conviction for owning and operating an illegal gambling business - specifically, the North Margin Street poker games. As with most of the charges, the government's primary evidence consisted of tape-recorded conversations. Viewing the pertinent conversations in the light most favorable to the government, we conclude that the conversations furnish ample support for the jury's verdict.

From the conversations, it is clear that Ilario Zannino was in charge of the day-to-day supervision of the North Margin Street poker games. Various others received a percentage of the profits. The games had a bankroll to cover certain operating expenses, such as the payment of winnings. This bankroll had become depleted, due to some players' failure to pay back loans from the house, and to other players' large winnings. In an effort to replenish the bankroll, the operation had temporarily ceased or scaled back the dispersal of its profits to the owners and operators.

Granito apparently did not know of these difficulties with the bankroll, and went to Gennaro Angiulo to ask when the game was going to be "whacked up" - i.e., when the profits were going to be divided and dispersed. Gennaro informed Granito that the profits were being channeled back into the operation to replenish the bankroll, but that he would "whack up" the game if Granito desired. Granito responded "no" and that he would not have asked if he had known about the difficulties.

The government relied on the tape recording of

this conversation between Granito and Gennaro to support its charge that Granito was receiving a percentage of the profits from the poker games, and thus was guilty of owning and operating an illegal gambling business. Granito's defense to this allegation, as articulated in his closing argument at trial, was that he had only asked Gennaro about the profits as a favor for Nicola Giso. The jury, however, clearly was free to reject this explanation, and it is not our role to second-guess their apparent decision to do so.

As additional evidence, the government presented the testimony of FBI Agent Eberhart. Testifying as an expert witness on gambling businesses, Eberhart stated his opinion that, based on his analysis of the tapes, Granito was a "partner" in the North Margin Street poker games. Although Granito has challenged the permissibility of this testimony, claiming it invaded the province of the jury, we discussed and rejected this challenge in Section IV.A(2), *supra*. Considering Agent Eberhart's testimony in conjunction with the tape recordings themselves, we find that there was sufficient evidence to support the jury's verdict that Granito was guilty of owning and operating an illegal gambling business.

VI. JURY CHARGE

Defendants claim a number of errors with respect to the trial court's jury charge. We consider each alleged error below.

A. Co-Conspirator Statements

Throughout the course of the trial, numerous co-conspirator statements were introduced against individual

defendants on the charges against them. Defendants argue that the trial court failed to apply properly the procedures articulated in *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977), and its progeny governing the admission of such co-conspirator statements. Specifically, defendants contend that the court's charge to the jury impermissibly placed the admissibility determination in the jury's hands rather than keeping it in the hands of the court.

Under the Federal Rules of Evidence, it is the responsibility of the judge to determine the admissibility of co-conspirator statements. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175 (1987). In *United States v. Petrozziello*, we held that the proper standard for the district court to apply in making this determination is to inquire whether the government has met the requirements of Fed. R. Evid. 801(d)(2)(E) by a preponderance of the evidence. *Petrozziello*, 548 F.2d at 22-23. Rule 801(d)(2)(E) provides, in pertinent part, that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." We held in *Petrozziello* that "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible." *Petrozziello*, 548 F.2d at 23.^{18/}

^{18/} This inquiry has since become known as "the *Petrozziello* determination."

Subsequently, in *United States v. Ciampaglia*, 628 F.2d at 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980), we articulated fairly detailed procedures for trial courts to employ in admitting co-conspirator statements:

If the prosecution attempts to introduce into evidence an out-of-court declaration under Fed.R.Evid. 801(d)(2)(E), the trial court, upon proper objection, may conditionally admit the declaration. If the declaration is conditionally admitted, the court should inform the parties on the record out of the hearing of the jury that (a) the prosecution will be required to prove by a preponderance of the evidence that a conspiracy existed, that the declarant and defendant were members of it at the time that the declaration was made, and that the declaration was in furtherance of the conspiracy, (c) that at the close of all the evidence the court will make a final *Petrozziello* determination for the record, out of the hearing of the jury; and, (c) that if the determination is against admitting the declaration, the court will give a cautionary instruction to the jury, or, upon an appropriate motion, declare a mistrial if the instruction will not suffice to cure any prejudice.

Id. at 638. This is the process that defendants claim the court below subverted in its charge to the jury.

To assess the validity of these allegations, we begin by reviewing the procedures followed by the district court in its treatment of co-conspirator statements. The court admitted co-conspirator statements provisionally throughout the course of the trial. Limiting instructions were given to the jury restricting the evidence to particular defendants and particular charges. At the close of all the evidence, a series of bench hearings were held concerning the court's final *Petrozziello* determinations, as required by *Ciampaglia*. The defendants took the position that the court was obligated to go through each tape-recorded conversation with counsel, charge by charge and defendant by defendant, before issuing a final *Petrozziello* ruling. Over 300 tapes were involved, and the process would have taken days. In an attempt to expedite the matter, the government drew up a list of the statements it was seeking to introduce against each defendant and for what charges. After argument on the government's list, the court issued a written order finding that the *Petrozziello* requirements were satisfied as to all co-conspirator statements on the list. The defendants raise no objections on appeal to any of the procedures up to this point. Nor do they challenge the merits of the court's final written *Petrozziello* order.

In his charge to the jury, the court then gave a general instruction outlining the *Petrozziello* standard. He stated:

Remember also that there are a number of separate conspiracies charged in the indictment. Statements made by the members of one alleged conspiracy during

and in furtherance of that conspiracy cannot be considered in determining whether a particular defendant is guilty of some other conspiracy, *unless you should find that such statements also were made during and in furtherance of that other conspiracy by members of that other conspiracy*. I shall give you more detailed instructions in this regard near the end of my instructions.

(Emphasis added). In later, more detailed instructions, the court stated:

You will recall that I orally instructed you on numerous occasions during the course of the trial concerning restrictions on the applicability of various forms of evidence, especially the tape-recorded conversations. In particular, each time the focus of the Government's proof shifted to a different category of offense, you remember that I instructed you as to which of the defendants that evidence was or was not applicable.

I now instruct you that each of these limiting instructions remains in effect . . . with the following two exceptions.

First, in your consideration of whether each of the defendants committed the RICO offenses charged in Counts 1 and 2. You may consider all tape-recorded conversations played at the trial except that the

previous limiting instructions shall continue to apply to your determination of whether the Government has proved the elements of each set of racketeering [acts] alleged against each defendant.

Second. You were instructed on several occasions that none of the tape-recorded conversations intercepted at 51 North Margin Street could be considered by you as evidence against the defendants at trial unless and until you received further instructions from me. I now instruct you that you may consider such conversations to the extent that you find them relevant to any charge in the indictment. I caution you in this regard, however, to apply all the principles regarding the use of alleged co-conspirator's statements about which I instructed you earlier. Since none of the defendants is alleged to have been present during these conversations you may consider such evidence *only if you first determine beyond a reasonable doubt that they contain statements made during the course of and in furtherance of a conspiracy of which both the speaker and the defendant under your consideration were members.*

I further instruct you, however, that you may not consider any statement allegedly made by Ilario Zannino at 51 North

Margin Street as constituting proof that Gennaro Angiulo was a co-conspirator in the Barboza murder conspiracy or the Walter or William Bennett murder conspiracies charged in the indictment.

(Emphasis added).

It is to this portion of the jury charge that defendants direct their objections. They contend that the court should have explicitly gone through its written *Petrozziello* order with the jury - tape-recorded conversation by tape-recorded conversation, charge by charge, and defendant by defendant - instructing them which conversations could be considered against whom and on what charges. In particular, defendants object to the emphasized portions of the instruction, arguing that by outlining the general *Petrozziello* standard for the jury, the court threw the *Petrozziello* determination back on the jury to make, contrary to the requirements of *Petrozziello*, *Ciampaglia*, and the Federal Rules.

We disagree. The *Petrozziello* determination was not simply thrown back to the jury. As the trial court noted in its charge and as we have found in reviewing relevant portions of the record, the court gave the jury limiting instructions with respect to the evidence throughout the course of the trial. These instructions repeatedly limited the admission of particular evidence, including co-conspirator statements, to certain defendants and certain charges. We read the court's written *Petrozziello* order as, to a large extent, merely finalizing these prior limiting instructions, at least with regard to the conversations

forming the heart of the government's case. The order stated:

Pursuant to *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980), this court has admitted on a conditional basis numerous alleged co-conspirator statements offered by the government under Fed. R. Evid. 801(d)(2)(E). Specifically, such statements have been admitted in connection with: (1) the separate conspiracies charged in Counts One, Twelve, Thirteen, Fourteen, Seventeen, and Nineteen; (2) the separate conspiracies charged in predicate acts 5(a)(7) and 5(a)(8); and (3) the separate joint ventures or concerted actions charged in Counts Three, Four, Five, Six, Seven, Sixteen, Eighteen, and Twenty. With regard to each of the sixteen charges, the respective co-conspirator statements so admitted are listed in subparagraph one of the relevant section in the Government's Memorandum Regarding Admissibility of Co-Conspirator Statements (Amended) filed on February 3, 1986.

The court now finds that the standard of *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977), has been satisfied with respect to each of these co-conspirator statements. Specifically, with respect to

each such statement, the court finds by a preponderance of the available evidence that (1) a conspiracy existed; (2) that the declarant and the defendant or defendants against whom the statement has been admitted were members of the conspiracy at the time the statement was made; and (3) that the statement was made during the course of and in furtherance of that conspiracy. Accordingly, each of these co-conspirator statements, although still restricted to the relevant conspiracy and the respective defendants charged with that conspiracy, shall otherwise be admitted unconditionally.

The court then explicitly reminded the jury of the prior limiting instructions in his charge. Thus, contrary to defendants' argument, the tapes were not simply thrown to the jury for them to sort through on their own. The jury explicitly was instructed that the court's prior limiting instructions remained in effect and governed their consideration of the tape recordings.

In reaching this conclusion, we recognize that the North Margin Street tapes were not the subject of the same sort of limiting instructions as were the other tape-recorded conversations. Even the North Margin Street tapes, however, were not simply thrown to the jury. The trial judge specifically instructed, presumably per his *Petrozziello* determinations, that no statements made by Zannino could be considered as proof that Gennaro Angiulo was a co-conspirator in the Barboza or Bennett

murder conspiracies.

It follows that it was not error for the trial court to have instructed the jury on the general *Petrozziello* standard. Because limiting instructions already were in place to restrict the jury's consideration of the evidence, providing the jury with the general standard could not prejudice the defendants. Rather, it gave them a second bite at the apple - a chance to convince the jury, where they had failed to convince the judge, that certain conversations should not be considered. This added layer of fact-finding was not necessary, but neither did it constitute error. See, e.g., *United States v. Monaco*, 702 F.2d 860, 878 (11th Cir. 1983); *United States v. Mastropieri*, 685 F.2d 776, 790 (2d Cir.), cert. denied, 459 U.S. 945 (1982); *United States v. Bulman*, 667 F.2d 1374, 1379 n.5 (11th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States v. Fontanez*, 628 F.2d 687, 689 (1st Cir. 1980), cert. denied, 450 U.S. 935 (1981); see also *United States v. Izzi*, 613 F.2d 1205, 1211 (1st Cir.), cert. denied, 446 U.S. 940 (1980).

We acknowledge that we cannot rule out the possibility that the court's limiting instructions during trial did not cover all of the co-conspirator statements. With respect to statements that might not have been covered, the jury would have had to make a *Petrozziello* determination itself, using the general standard explained to them in the jury charge. The fact that we cannot rule out this possibility, however, does not require reversal where thorough and careful limiting instructions were repeatedly given during trial, and where the jury at least was given the general standard to apply to any conversations that

may have been uncovered by the judge's instructions. Cf. *United States v. Angiulo*, 847 F.2d 956, 970-73 (1st Cir. 1988) (noting, with approval, that the general *Petrozziello* standard had been given to the jury to limit its consideration of co-conspirator statements).

B. *Voice Identification*

Defendants next contend that the trial court erred in failing to give an instruction requested by defendants regarding FBI Agent Quinn's testimony identifying defendants' voices in various tape-recorded conversations. Quinn testified at trial concerning the means by which the FBI had acquired, maintained, enhanced, and made transcripts of the audio recordings intercepted at 98 Prince Street and 51 North Margin Street. More importantly, he testified concerning his identification of the various defendants' voices in the tape recordings.

Defendants, for obvious reasons, attempted to cast doubt on this identification testimony. Both during the cross-examination of Quinn and in their opening and closing statements at trial, defendant emphasized the difficulties involved in accurately identifying the voices - in particular, the difficulties caused by the considerable amount of background noise on the tapes. Their questions on cross-examination also revealed that the government's initial identification of certain voices had been revised.

At the close of the evidence, the defendants requested the following jury instruction on the issue of voice identification, in order to present to the jury their contention that, contrary to the government's position,

some of the voices on crucial tapes could not accurately be identified:

[T]he testimony of Mr. Quinn as to each of his identifications of the voice of a defendant must be received with caution and scrutinized with care. The government's burden of proof extends to every element of each crime charged, including the burden of proving beyond a reasonable doubt the identity of an alleged perpetrator of an offense.

The court declined to give this requested instruction specifically, and defendants now argue that this failure deprived them of their right to have the jury instructed on their theory of defense.

As a general proposition, "an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it." *United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988); *see also United States v. Silvestri*, 790 F.2d 186, 192 (1st Cir.), *cert. denied*, 479 U.S. 857 (1986). In determining whether the defendant has satisfied this criteria, the trial court's function is "to examine the evidence of record and the inferences reasonably to be drawn therefrom to see if the proof, taken most hospitably to the accused, can plausibly support the theory of defense." *Rodriguez*, 858 F.2d at 812. Even then, we have held that:

[t]he refusal to give a particular requested instruction, however, is reversible error only

if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense."

United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984) (quoting *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. 1981)).

Applying these standards to the facts before us, it is clear that the matter of voice identification was of importance to the defendants' defense. Given the amount of background noise on certain tapes as well as Agent Quinn's admission that some voice identifications had been revised, we also find that there was sufficient evidence in the record to support the defense. Thus, as articulated in *United States v. Gibson*, our inquiry becomes whether the defendants' requested instruction (1) was substantively correct; (2) was not substantially covered in the charge actually given; and (3) was sufficiently important such that the failure to give it impaired the defendants' ability effectively to present their defense.

We begin by answering the first question in the affirmative. In *United States v. Kavanagh*, 572 F.2d 9 (1st Cir. 1978), a case involving a challenge to eyewitness identification, we noted that a requested instruction substantially similar to the instruction requested here was appropriate "in cases where the evidence suggests a

possible misidentification." *Id.* at 10.^{19/}

We conclude, however, that defendants have failed to satisfy the remaining two requirements of *Gibson*. First, we find that a number of the court's general jury instructions, when considered in the context of the charge as a whole, substantially covered the issues raised in the requested voice identification instruction. The court gave a general instruction on witness credibility, informing the jury that they must determine the credibility of all of the evidence and specifically the credibility of each witness' testimony. The court also instructed the jury that the written transcripts of the tape recordings introduced by the government had no independent evidentiary value and were only to be used to help the jury discern the words on the tapes. Finally, the court repeatedly emphasized in its charge the government's burden of proof as to each element of the crimes charged.

These instructions put the jurors on notice that they were to listen to the tapes themselves and reach their own determinations, and not blindly base their verdict on any interpretation of the tapes by government witnesses or on any government-prepared transcripts. Although Agent

^{19/} The instruction requested in *Kavanagh* was worded as follows: [t]estimony of witnesses as to identity must be received with caution and scrutinized with care. The burden of proof of the Government extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the perpetrator of the offense for which he stands charged.

Kavanagh, 572 F.2d at 11.

Quinn's testimony was not specifically mentioned, the court's general witness credibility instructions emphasized that the jury was to scrutinize all the witnesses' testimony carefully as part of its determination whether the government had satisfied its burden of proof on each element of the crimes charged.

The sufficiency of these instructions is even more apparent when they are considered in the context of the trial as a whole. In particular, defense counsel focused heavily on the voice identification issue in cross-examining Agent Quinn and also in closing argument. Having heard these defense arguments, a jury receiving the court's general instructions on witness credibility, the government's burden of proof, and the limited purpose of the transcripts would understand that Agent Quinn's testimony was to be scrutinized with care. *Cf. United States v. Rubio*, 834 F.2d 442, 447 (5th Cir. 1987) (holding that when determining the adequacy of a jury charge, an appellate court should "look to the record and the closing arguments to place the words of the judge in context.") We conclude that the court's general jury instructions, when considered in the context of the trial, substantially covered the issues raised in the requested voice identification instruction.

Furthermore, we find under the third prong of the *Gibson* standard, that the trial court's failure to give the requested instruction did not impair the defendants' ability effectively to present their voice identification defense. During the cross-examination of Agent Quinn, defendants explicitly challenged his ability to identify on the tapes what was said and who was speaking. Similarly, during

closing arguments, counsel for Michele and Donato Angiulo stressed the difficulty of identifying voices on the tapes, noted that Agent Quinn had corrected mistakes in some identifications, and urged the jury to question Agent Quinn's ability to identify accurately the defendants' voices. In light of this, we cannot find that defendants were impaired in presenting their voice identification defense to the jury. Consequently, we find nonprejudicial error in the court's failure to give defendants' requested instruction. *Cf. Kavanagh*, 572 F.2d at 12-13 (finding, on similar facts, no error in the trial court's failure to give a requested eyewitness identification instruction).^{20/}

C. *Multiple Gambling Businesses*

Defendants raise a similar objection to the court's failure to instruct the jurors, as requested, that they could choose to find only one overall gambling business in violation of 18 U.S.C. §1955, rather than the five separate gambling businesses that the indictment charged in five separate counts. Defendants argued below that the government was charging five separate businesses, rather than one, in order to increase its chances of obtaining

^{20/} In the analogous context of eyewitness identification, some courts have held that where witness identification is disputed, the trial court *must* give the jury a cautionary instruction about identification testimony if such an instruction is requested. *See, e.g., United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987); *United States v. Anderson*, 739 F.2d 1254, 1258 (7th Cir. 1984). In *United States v. Kavanagh*, 572 F.2d 9, however, we declined to adopt such a rule of *per se* reversal, choosing not to constrain district courts with yet another mandatory requirement. *See id.* at 13; *see also United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987).

guilty verdicts on at least two predicate acts, and thus of obtaining RICO convictions. The jury returned guilty verdicts with respect to four of these businesses: the "Las Vegas" nights; the Lowell barbooth games; the numbers business; and the North Margin Street poker games. Defendants now contend that the trial court erred by failing to instruct the jury on defendants' "one business only" defense to these multiple charges.

The same legal standards govern our review of this contention as governed our analysis of defendants' proposed voice identification instruction. Applying these standards, there are two fatal flaws in defendants' argument. First, defendants failed to present sufficient evidentiary support to warrant instructing the jury on their "one business only" theory. As we stated previously, "[a] judge is required to charge on a defense theory only if the evidence provides some foundation for it." *United States v. Durrani*, 835 F.2d 410, 419-20 (2d Cir. 1987); *see also Silvestri*, 790 F.2d at 192. Defendants have failed to provide such a foundation. They have not pointed to any place in the record, and we have found none, where an evidentiary basis was laid to support the proposition that the gambling operations were so linked as to constitute only one business. At best, they can cite to one short sequence of questions on cross-examination of an FBI agent and one brief comment in the closing argument of defense counsel where reference was made to the "one business only" theory. These references, however, were no more than conclusory allegations and insinuations that the government was acting in bad faith and charging five

gambling businesses solely to increase its chances of obtaining a guilty verdict on two predicate RICO acts. Defendants offered no evidentiary support for these allegations. This lack of support is in contrast with the government's evidence in favor of finding distinct businesses - the gambling activities were conducted over different time periods, held in different locations, and operated by different managers and personnel. There was little or no evidentiary grounds to warrant instructing the jury on the "one business only" theory. *See Rodriguez*, 858 F.2d at 815.

Furthermore, even assuming adequate foundation in the record, defendants have failed to show that the "one business only" defense played a sufficiently important role in the trial so that the failure to give the requested instruction "'seriously impaired the defendant's ability to effectively present a given defense.'" *Gibson*, 726 F.2d at 874 (quoting *Grissom*, 645 F.2d at 464). As we have noted, only passing reference was made to the issue at trial.^{21/} The paucity of such references undercuts any argument that the issue was of such importance that the failure specifically to instruct on it seriously impaired a given defense. And the references that were made

^{21/} Early in the proceedings, defendants did move to dismiss the multiple gambling counts on the ground that only one business was involved and that it violated double jeopardy principles to charge multiple counts. After this motion was denied, defendants dropped the double jeopardy argument. Because defendants' reply brief makes it clear that they are not relying on the double jeopardy argument on appeal, we do not consider it here.

indicated that the "one business only" theory was targeted at undermining any RICO verdict founded solely on gambling predicate acts. Yet, all of the defendants convicted under RICO were found guilty of at least one non-gambling predicate act. This further weakens any contention that the "one business only" theory could have played a crucial role in the defenses primarily raised and relied on by defendants. For all these reasons, we find no reversible error in the trial court's failure to instruct the jury on the "one business only" theory.

D. *Credibility Instructions and Donald Smoot*

Defendants contend that the trial court erroneously refused to instruct the jury on general credibility considerations to take into account in evaluating witnesses' testimony and also erroneously failed specifically to name the witness Donald Smoot as an informer.

With regard to the general credibility instructions, defendants argue that the court should have informed the jury of considerations to be taken into account in evaluating witness credibility. In particular, defendants object to the court's failure to instruct the jury that it should consider a witness' prior inconsistent statements in determining how much weight to accord that witness' testimony.

In considering such a challenge, there is no reversible error if the jury charge taken as a whole substantially covered the issues contained in the requested instruction. *See Gibson*, 726 F.2d at 874. After reviewing the court's charge in this case, we conclude that the charge did substantially cover the type of credibility considerations

raised by defendants. The court explicitly instructed the jurors that it was entirely their responsibility to determine the credibility of witnesses, and that they could choose not to believe certain witnesses at all. In terms of specific credibility considerations, the court cautioned the jury to scrutinize with particular caution and care the testimony of accomplices and informers, instructing them to consider whether testimony may have been motivated by a desire "for immunity from punishment or for personal advantage or vindication" or "affected by interest or by prejudice against a defendant." The court also gave explicit instructions on evaluating expert testimony, advising the jurors that they could accept such testimony, reject it, or give it as much weight as they thought it deserved in light of a particular witness' education and experience.

Although the court did not give a specific instruction on prior inconsistent statements, as requested by defendants, this omission cannot constitute reversible error where the jury charge as a whole substantially covered general credibility considerations. *See United States v. Williams*, 809 F.2d 75, 88 (1st Cir. 1986) (finding no error in the trial court's failure to give a particular credibility instruction where the court had adequately given general credibility instructions), *cert. denied*, 481 U.S. 1030 (1987).

Defendants also object to the trial court's failure to name the witness Donald Smoot as an informer. Smoot testified as part of the government's case-in-chief regarding his financial dealings with certain of the defendants - in particular, a \$14,000 loan he had received from Donato Angiulo that the government alleged was an extortionate

credit transaction. The defendants characterized Smoot as a government informer and requested the following jury instruction:

[T]he testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication such as Mr. Smoot must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses.

The trial court gave this requested instruction almost verbatim, but declined to name Smoot specifically as an informer. Defendants contend that this omission constitutes reversible error.

We are not persuaded. The trial court gave the heart of the requested instruction and declined only to name names, which was well within its discretion. Because the government disputed the characterization of Smoot as an informer, for the court to have named Smoot specifically would have constituted commenting on the evidence. While the court has sufficient discretion to so comment, it has equally ample discretion not to comment. *See United States v. Taylor*, 562 F.2d 1345, 1364 & n.11 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977). We find no error in the court's decision not to name Smoot specifically as an informer.

E. *Extortionate Loans*

Defendants' next claim of error pertains to the jury instruction given with respect to count 12 of the indict-

ment, which charged Gennaro, Donato and Francesco Angiulo with conspiring to make an extortionate extension of credit of \$14,000 to Donald Smoot. Defendants contend that the court's instruction on count 12 failed adequately to differentiate this alleged \$14,000 loan to Smoot from a distinct \$14,000 loan to Smoot made by Ilario Zannino. To understand this contention, it is necessary to state the pertinent facts.

Count 11 of the initial indictment charged co-defendant Zannino with making an extortionate \$14,000 loan to Donald Smoot. Count 12 of the indictment charged Gennaro, Donato and Francesco Angiulo with making a separate and distinct extortionate loan to Smoot, also in the amount of \$14,000. The prosecution's opening statement to the jury referred to both loans. Shortly after opening statements, Zannino's trial was severed from that of his co-defendants due to his ill health. Consequently, count 11 was not submitted to the jury.

The defendants' defense to count 12 was premised on the argument that only one \$14,000 loan to Smoot existed, and it had been made by Zannino, not by the Angiulos. The government contended that two separate and distinct loans existed and introduced evidence supporting the existence of two separate loans. Both the prosecution and the defense argued their respective positions to the jury.

Expressing a concern that the jury would confuse count 11 and 12, and mistakenly return a guilty verdict on count 12 that actually was premised on the Zannino loan, defendants requested an explicit instruction to the jury

that count 12 did not charge the Zannino loan. The court declined to give this instruction, and defendants contend that this omission constituted reversible error.

We disagree. Reviewing the instructions as a whole, as we must, *see United States v. Serino*, 835 F.2d 924, 930 (1st Cir. 1987), we find that the court's instructions were sufficiently clear to eliminate any likelihood that the jury would confuse the Zannino loan (count 11) with the Angiulo loan (count 12). The court explicitly instructed the jury that counts 7 through 11 had been deleted from the indictment. Furthermore, the court read count 12 to the jury and reviewed each of the elements of the charge. As part of that review, the court explicitly named Gennaro, Donato, and Francesco Angiulo as the individuals being charged with the loan. Finally, the redacted indictment together with written copies of the entire charge were provided to the jury. Given these circumstances, we find it exceedingly difficult to believe that the jury could have been confused about the nature of count 12. Although the court did not give the precise instruction requested by defendants, the careful instructions that were given more than adequately covered the situation.

F. *RICO's Pattern of Racketeering Activity*

Defendants' final challenge to the jury charge is that the trial court erred in defining "pattern of racketeering activity" under RICO. Defendants argue that the court "failed to tell the jury that 'while two [racketeering] acts are necessary [to constitute a "pattern"], they may not be sufficient.'" Brief for Granito at 44 (quoting *Sedima*,

S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)). Defendants further contend that the court "failed to direct the jury's attention to the requirement that the predicate acts be related to each other by some organizing principle that renders them 'ordered' or 'arranged.'" *Id.* (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989)).

While defendants properly cite *Sedima* and *H.J. Inc.* for the proposition that predicate acts must be related to constitute a pattern of racketeering activity under RICO,^{22/} we do not agree with defendants' argument that the trial court below failed to instruct the jury on this relationship requirement. The court explicitly instructed the jury that to prove a pattern of racketeering activity, the government must show that at least two acts of racketeering were committed and, *inter alia*, "that the offenses were connected to each other by some common scheme, plan, or motive and were of sufficient number such that you find that they constituted a planned ongoing continuing crime, in other words, a pattern as opposed to sporadic, unrelated, isolated criminal episodes." These instructions, rather than failing to convey the essence of the pattern requirement, presciently anticipated the Supreme Court's language three years later in *H.J. Inc.* that criminal acts are sufficiently related if they "'have the same or similar purposes, results, participants, victims, or

^{22/} For a more extended discussion of *H.J. Inc.* and its explanation of RICO's "pattern of racketeering activity" element, see our analysis of defendants' void for vagueness challenge to RICO in Section II, *supra*.

methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 109 S. Ct. at 2901 (quoting 18 U.S.C. §3575(e)). Accordingly, we reject defendants' claim of error.

VII. FORFEITURE

As part of its overall verdict, the jury returned a special verdict form finding various assets of defendants to be subject to forfeiture pursuant to 18 U.S.C. §1963. Section 1963 sets forth criminal penalties to be applied to those who have been found guilty, as defendants were, of engaging in racketeering activities in violation of 18 U.S.C. §1962. The specific forfeiture provisions applied by the jury in this case were §1963(a)(1) and (a)(2). These provisions state:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.

18 U.S.C. §1963 (1982).^{23/} Determining that some assets had been acquired or maintained in violation of (a)(1) and that others had afforded a source of influence under (a)(2), the jury found that several pieces of real estate, a substantial amount of cash, six Chrysler bonds, and a yacht all were subject to forfeiture. The defendant challenge these forfeitures, raising several claims of error.

A. *Timing of Ownership*

Defendants first contend that the trial court erred in failing to instruct the jury that, before forfeiting an asset on the ground that it provided a source of influence under §1963(a)(2), the jury had to find initially that the defendant owned the property at issue at the time of indictment. The government responds that its interest in forfeitable property vests at the time of the unlawful activity and cannot be extinguished by a subsequent transfer of the property prior to the indictment.

The government's position clearly is the accepted view with respect to forfeitures under §1963(a)(1). Courts that have considered RICO forfeitures in this context have held that RICO forfeiture, unlike forfeiture under other statutes, "is a sanction against the property itself." *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *see also United States v. Robilotto*, 828 F.2d 940, 948-49 (2d Cir. 1987), *cert. denied*,

^{23/} RICO's forfeiture provisions were amended by Congress in 1984. Pub. L. 98-473, title II, §§302, 2301(a)-(c), 98 Stat. 2040, 2192 (1984). For purposes of this appeal, the pre-1984 version is the governing provision.

484 U.S. 1011 (1988). Because RICO forfeiture is an *in personam* action, rather than an *in rem* action, it has been held that the government's interest in the forfeitable property vests at the time of the unlawful activity and cannot be defeated by the defendants' subsequent transfer of the property. See *Ginsburg*, 773 F.2d at 801; see also *United States v. Navarro-Ordas*, 770 F.2d 959, 969-70 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

Defendants acknowledge the holdings of these cases but argue that (a)(2) forfeiture should be treated differently from (a)(1) forfeiture. They, however, have cited nothing in the legislative history of RICO or anywhere else to support the proposition that RICO forfeiture under §1963(a)(2) should be treated as an *in rem* action, in contrast to forfeiture under (a)(1), which is universally treated as an *in personam* action. The cases that we have reviewed in the (a)(1) context make no mention of such a distinction, and do not suggest that their *in personam* reasoning is limited only to (a)(1) forfeiture. Rather, they state that RICO forfeiture, presumably in general, is an *in personam* sanction. See, e.g., *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

We, therefore, reject defendants' contention that (a)(2) forfeiture can only occur when the property was owned at the time of the indictment. Due to the *in personam* nature of RICO forfeiture, we find that under (a)(2) as well as under (a)(1), the government's interest in the forfeitable property vests at the time of the unlawful

activity and cannot be defeated by the defendants' subsequent transfer of the property.^{24/}

B. *Proportional Forfeiture*

Defendants next argue that the trial court erred in failing to instruct the jury that it had the option of only forfeiting a portion of certain amounts of cash that the government sought under §1963(a)(2), rather than forfeiting the cash on an all or nothing basis. The facts underlying this claim are rather complex, so we state them with some care.

As discussed earlier, the forfeiture form given to the jury presented only two legal theories under which the jury could find assets subject to forfeiture: (1) assets could be forfeited because they were acquired and maintained in violation of §1963(a)(1) - e.g., because they constituted proceeds or profits of an illegal racketeering enterprise; or (2) assets could be forfeited because they afforded a source of influence over an illegal enterprise in violation of §1963(a)(2). With respect to assets or property that the government sought to forfeit under §1963(a)(1), the jury received a proportionality instruction. The court instructed it to determine what percentage of the assets or

^{24/} We note that the 1984 amendments to RICO make it explicitly clear that the government's interest vests at the time of the unlawful activity. See 18 U.S.C. §1963(c) (1988). While it can be disputed whether the actions of a later Congress provide a valid basis for discerning the intent of an earlier Congress, the 1984 amendments have been interpreted as merely confirming "the already clearly-established legislative intent behind RICO's forfeiture provision." *Ginsburg*, 773 F.2d at 803.

property actually constituted proceeds or profits, and to forfeit only this percentage. With respect to assets or property that the government sought to forfeit under §1963(a)(2), the court gave a proportionality instruction regarding certain items, but not others. The court declined to give a proportionality instruction with respect to \$331,576 in cash that was seized at 98 Prince Street and \$41,025 in cash that was seized at 95 Prince Street. As to these items, the jury was to forfeit under §1963(a)(2) on an all or nothing basis.

In its forfeiture verdict, the jury found that 50% of the cash described above constituted proceeds or profits under §1963(a)(1). It also found that the cash afforded a source of influence over the enterprise under §1963(a)(2). Due to the latter determination, 100% of the cash was ordered forfeited.

Defendants contend that the court erred in forfeiting the cash on an all or nothing basis under §1963(a)(2). They argue that the jury should have been instructed to apply a proportional forfeiture theory to these assets and to forfeit only that percentage of the cash that actually was used to further the affairs of the enterprise. We agree.

The types of property interests subject to forfeiture under §1963 can be divided into two broad categories: (1) interests *in* a RICO enterprise, and (2) interests *outside* the enterprise. Any interests *in* an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity. As the Ninth Circuit stated in *United States v. Busher*, 817

F.2d 1409 (9th Cir. 1987): "[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *Id.* at 1413.

The forfeiture of interests *outside* the enterprise, however, is subject to limitations. It has been held that the forfeiture of outside interests is subject to a rule of proportionality. See *United States v. Porcelli*, 865 F.2d 1352, 1362-65 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); *United States v. Horak*, 833 F.2d 1235, 1242-43 (7th Cir. 1987). Such outside interests include proceeds or profits forfeitable under §1963(a)(1), *see, e.g., Horak*, 833 F.2d at 1242-43, and also property that affords a source of influence over an enterprise, which is forfeitable under §1963(a)(2). See *Porcelli*, 865 F.2d at 1634-65; *see also United States v. McKeithen*, 822 F.2d 310, 314-15 (2d Cir. 1987) (requiring, under the continuing criminal enterprise statute, 21 U.S.C. §848(a)(2)(B), proportional forfeiture with respect to property affording a source of influence over an enterprise). Under this proportionality rule, proceeds or profits and property affording a source of influence are only subject to forfeiture to the extent they are tainted by the racketeering activity. This is in contrast to the treatment of interests *in* an enterprise, which are forfeitable regardless of percentage of taint.

The court below properly instructed the jury on the proportionality rule regarding "proceeds or profits" under §1963(a)(1). With respect to the \$331,576 and \$41,025 in cash, however, the court erroneously failed to instruct the

jury to apply the proportionality rule regarding "source of influence" forfeiture under §1963(a)(2).

The government strenuously contends that no such proportionality instruction was required. Our review of the cases cited by the government in support of its contention reveals that these cases refer to the forfeitability of interests *in* an enterprise, which is not the situation presented here. *See, e.g., Busher*, 817 F.2d at 1413; *Cauble*, 706 F.2d at 1349-50. The jury was explicitly instructed to apply the "source of influence" forfeiture theory. It was *not* instructed to consider whether the cash constituted an interest *in* the enterprise, and a proportionality instruction was required. *See Porcelli*, 865 F.2d at 1364-65.

The government also argues that the statutory language of §1963(a)(2) negates the need for a proportionality instruction. It quotes the provision as requiring the forfeiture of "*any interest in . . . property . . . of any kind affording a source of influence over*" a RICO enterprise. Brief for Government at 120. (Emphasis added by the government). This is a highly selective statutory excerpt, and omits crucial language and punctuation that serve to delineate the types of interests subject to forfeiture. Quoted correctly, §1963(a)(2) provides for the forfeiture of "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any [RICO] enterprise." Interpreted in a manner consistent with its punctuation, this provision first provides for the forfeiture of any interest in an enterprise; these are "inside" interests subject to

forfeiture regardless of percentage of taint. The provision also *separately* provides for the forfeiture of property affording a source of influence over an enterprise. We interpret this as referring only to that property that affords a source of influence - in other words, only that property that is actually tainted.^{25/} Viewed this way, the statutory language supports the requirement that a proportionality instruction be given with respect to "source of influence" forfeitures. Cf. *McKeithen*, 822 F.2d at 314-15 (interpreting virtually identical language in the continuing criminal enterprise statute, 21 U.S.C. §848(a)(2), as requiring a proportionality instruction). Because the trial court failed to give a proportionality instruction with respect to the cash seized, we reverse that part of the judgment forfeiting the cash under a source of influence of theory. Only the 50% of the cash that was forfeited as proceeds or profits was properly forfeited.^{26/}

C. *Bonds and Yacht*

Defendants Donato and Francesco Angiulo next challenge the forfeiture of their ownership interests in the six Chrysler bonds and yacht that were seized by the government. The jury found that 50% of Donato's and

^{25/} Contrary to the government's "quotation," the provision nowhere refers to "any interest in property affording a source of influence."

^{26/} As a final argument, the government contends that even under a proportionality theory, the jury could only have found that 100% of the money was used as a source of influence. We are unwilling to engage in that type of speculation, and decline to uphold the 100% forfeiture on this ground.

Francesco's interests in those items constituted proceeds or profits of the RICO enterprise and thus were subject to forfeiture under §1963(a)(1). Defendants contest this finding, and argue that according to the indictment and the evidence introduced at trial, they cannot be deemed to have joined the enterprise through the commission of two predicate acts until *after* the acquisition of the bonds and the yacht. As a result, they say, their interests in these items cannot constitute proceeds or profits resulting from their involvement in the enterprise, and were not properly forfeitable by the jury under §1963(a)(1). We agree.

To determine what is properly forfeitable under §1963(a)(1), courts have applied a "but for" test. Under this test, (a)(1) forfeitures are limited to property interests that would not have been acquired or maintained but for the defendant's racketeering activities. See *United States v. Ofchinick*, 883 F.2d 1172, 1183-84 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 753 (1990); *Porcelli*, 865 F.2d at 1364-65. To put it another way, defendants' racketeering activities must be shown to be "a cause in fact of the acquisition or maintenance of these interests or some portion of them." *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987). This "but for" test is a proportionality rule of forfeiture. Such a rule is applied because, as already discussed, proceeds or profits constitute property interests *outside* the enterprise and thus are only forfeitable to the extent they are actually tainted by unlawful activities.

For any property to be forfeitable under this "but for" test, the property would have to have been acquired by defendants *after* the defendants joined the RICO

enterprise. If property were acquired *before* the defendants joined the enterprise, it could not be said that the property would not have been acquired but for the defendants' racketeering activities.

Applying this analysis to the evidence adduced at trial requires that we overturn the forfeiture of Donato's and Francesco's interests in the bonds and yacht. The government's proof at trial established that the Chrysler bonds and the yacht were acquired in 1979 and February, 1980 respectively. The earliest predicate act of racketeering on which Donato was convicted commenced in January, 1981, well after the time of acquisition of the bonds and the yacht. The commission of two such predicate acts is required for conviction as a member of a RICO enterprise. *See, e.g., United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983). Because Donato had not even committed one act prior to the acquisition of the bonds and the yacht, he cannot be said to have joined the enterprise until after these assets were acquired. For the reasons stated, the "but for" test therefore was not satisfied as to Donato's interests in the bonds and yacht.

Similarly, the "but for" test was not satisfied as to Francesco's interests in the bonds and yacht either. We recognize that Francesco was convicted on one predicate act - operating the Las Vegas nights - that commenced in June, 1979 and thus occurred *prior* to the acquisition of the bonds and yacht. The second earliest predicate act,

however, was not alleged to have commenced until October, 1980 (the North Margin Street poker games). Because two predicate acts of racketeering are needed to support a defendant's conviction as a member of a RICO enterprise, and because Francesco's second act did not occur until October, 1980, Francesco cannot be deemed to have joined the enterprise until *after* the bonds and yacht were acquired. Therefore, the bonds and yacht cannot be considered proceeds or profits of Francesco's participation in the enterprise, because he was not a member of the enterprise until after they were acquired.

The government argues in response that the enterprise began its unlawful activities as early as 1967, well *before* the bonds and yacht were acquired, and thus it is immaterial that Donato's and Francesco's commission of two racketeering acts occurred after the time of the property's acquisition. The government's theory of forfeiture, however, was that this property constituted the proceeds or profits of defendants' participation in the RICO enterprise. The crucial date, therefore, is when the defendants joined the enterprise, not when the enterprise began its operations. The proof at trial established that Francesco and Donato joined the enterprise after the acquisition of the bonds and yacht. These assets cannot, therefore, have been acquired as a result of Francesco's and Donato's participation in the enterprise.

The government mentions in passing a final theory that the property was forfeitable because it was *maintained* a result of defendants' participation in the enterprise, even though it may not have been acquired as a result of this

participation. It is true that §1963(a)(1) provides for the forfeiture of any property "acquired or maintained" as a result of racketeering activities. We recognize that some assets might be maintained as a result of participation in a RICO enterprise even though the timing of their acquisition prevents finding them to have been acquired as a result of such participation. Our review of the record, however, reveals that the government did not argue a maintenance theory to the jury. It argued only an acquisition theory. We must therefore reject the maintenance justification advanced by the government on appeal. We reverse that part of the judgment forfeiting Donato's and Francesco's interest in the Chrysler bonds and the yacht.

D. *Cafe Pompeii and Cash*

Defendants Gennaro, Donato and Francesco Angiulo challenge the sufficiency of the evidence underlying the forfeiture of their interest in the Cafe Pompeii, located at 280 Hanover Street. Francesco also challenges the sufficiency of the evidence supporting the forfeiture of \$41,025 in cash found in his apartment.

The jury found that the Cafe Pompeii afforded defendants a source of influence over the enterprise and thus was subject to forfeiture under §1963(a)(2). Defendants do not dispute that the property was properly forfeitable if it was used to further the affairs of the enterprise. See *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Their contention is that the evidence was not sufficient to support a finding that the Cafe Pompeii was so used.

In considering such a challenge, we must sustain

the jury's forfeiture verdict if, viewing the evidence in the light most favorable to the government, there is substantial evidence to support it. See *Ofchinick*, 883 F.2d at 1177; *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983). After carefully reviewing the relevant portions of the record, we find that there was sufficient evidence to support forfeiting the defendants' interests in the Cafe Pompeii on the ground that it was used to further the affairs of the enterprise.

Tape-recorded conversations revealed that Donato Angiulo met with representatives of the Winter Hill gang to resolve certain misunderstandings that had arisen with respect to some racketeering activities involving the Angiulos and the Winter Hill gang. The conversations referred to these meeting as having taken place at the "coffee shop." Donato related the substance of these meetings to Gennaro Angiulo, and received instructions from Gennaro as to how to handle the matter.

The defendants acknowledge that these tape-recorded conversations took place, but argue that no evidence was introduced to establish that the "coffee shop" referred to in the conversations was indeed the Cafe Pompeii, as the government contends. We disagree. The evidence revealed that in January, 1981, the Cafe Pompeii was cited for various licensing violations. In tape-recorded conversations discussing these violations, defendants referred to the Cafe as the "coffee shop." Thus, the jury could permissibly infer that the "coffee shop" and the Cafe Pompeii are one and the same entity. This connection, in turn, establishes that the meetings held by Donato with

the Winter Hill gang to resolve "business" disputes did indeed occur at the Cafe Pompeii. Such meetings clearly served to further the affairs of the RICO enterprise, and provided sufficient basis for forfeiting the Cafe under §1963(a)(2). Furthermore, other tape-recorded conversations revealed that Donato met with an individual named Walter LaFreniere in the Cafe. A jury could infer that these conversations related to collection of the weekly payments owed to the enterprise by LaFreniere's father, Louis Venios, as a result of loansharking transactions. All this evidence was more than sufficient to support a jury's finding that the Cafe Pompeii was the "coffee shop" and was forfeitable under §1963(a)(2) on the ground that it furthered the affairs of the enterprise.

Francesco Angiulo also challenges the sufficiency of the evidence underlying the forfeiture of \$41,025 in cash that was found in his apartment by FBI agents during the execution of a search warrant. The jury found that this cash was subject to forfeiture on two grounds. First, 50% of the cash was forfeitable on the ground that it constituted proceeds or profits of racketeering activities under §1963(a)(1). Second, the cash was forfeitable because it afforded a source of influence over the enterprise under §1963(a)(2). We already have reversed that part of the forfeiture that was premised on the source of influence theory, due to the trial court's failure to give a proportionality instruction. We now consider whether there was sufficient evidence to support the jury's finding that 50% of the cash was forfeitable as proceeds or profits.

Viewing the evidence in the light most favorable to the government, we find sufficient basis to support forfeiting the cash as proceeds or profits of racketeering activity. Ample evidence was introduced at trial to connect Francesco's apartment at 95 Prince Street with the operation of the enterprise's illegal gambling businesses. Government agents testified that an adding machine was found in the apartment - a discovery consistent with Francesco's role as accountant for the enterprise. Agents also discovered an unauthorized telephone line that had been patched into the apartment, supporting an inference that Francesco was managing illegal operations from the apartment. Furthermore, the jury heard various tape-recorded conversations in which Gennaro Angiulo expressed concern about possible search warrants and ordered their property to be cleaned up so no incriminating evidence would be found. He specifically asked about the existence of "stuff" at 95 Prince Street, and later reminded Francesco that if police walked into a private house and found \$25,000 in a drawer: "[w]e got a fuckin problem."

This evidence furnished a more than adequate basis for the jury to conclude that Francesco's apartment was connected with the enterprise's unlawful activities, and that any cash found there was forfeitable under §1963(a)(1) as proceeds or profits of such activities. We reject Francesco's claim that the evidence was insufficient to support the jury's forfeiture of 50% of the \$41,025 in cash found in his apartment.

E. *Imposition of Interest*

Defendants' final challenge pertains to the trial court's order that defendants must pay interest to the government on certain forfeited real estate. Before beginning our legal analysis, we state the facts and defendants' argument.

In its forfeiture verdict, the jury found that 42% of the current fair market value of Gennaro's, Francesco's, and Donato's interests in their Friend and Canal Streets property was forfeitable as proceeds or profits of their racketeering activities under §1963(a)(1). The Canal Street property had been transferred to the Angiulos by Joseph Palladino. Forty-two percent of the property's market value in 1986 was deemed equivalent to the proceeds or profits realized from a \$200,000 extortionate debt owed to the Angiulos by Palladino - a debt that was cancelled when Palladino transferred the property to the Angiulos.

The jury's verdict was returned on February 26, 1986. It was not until February 17, 1989, however, that the district court issued its final judgment of forfeiture. At a post-verdict hearing held prior to this final forfeiture judgment, the court entertained suggestions from counsel as to how to treat the forfeitable 42% interest in the property. The government argued that it should receive 42% of the property's value at the time of final judgment rather than 42% of its value at the time of the jury's verdict, especially given the substantial period of time since the jury's verdict. Defendants proposed that the government receive 42% of the property's value at the

time of the jury's verdict, plus some recognizable market rate of interest on that amount for the intervening years between the verdict and the final judgment.

The court selected the latter alternative. It ordered the forfeiture of 42% of the market value of the Canal Street property as of the date of the jury's verdict and also required defendants to pay interest of 8.6% per year on that amount for the period from the date of the jury's verdict to the date of the court's order. Defendants now argue that nothing in the RICO forfeiture statute authorizes the award of such interest and the trial court's imposition of interest should be overturned. We disagree.

First, we do not think that defendants can properly challenge on appeal a proposal they themselves offered to the trial court. Having persuaded the court to adopt their proposal, rather than the government's, defendants should not be allowed to circumvent the judicial process by challenging on appeal the trial court's decision to adopt it. *Cf. United States v. Rosenthal*, 793 F.2d 1214, 1245 (11th Cir. 1986) (stating that appellant could not challenge, on appeal, testimony that his own attorney had elicited at trial), *cert. denied*, 480 U.S. 919 (1987); *United States v. Truitt*, 440 F.2d 1070, 1071 (5th Cir.) (similar), *cert. denied*, 404 U.S. 847 (1971).

In any event, we find that the trial court had sufficient discretion to impose interest in order to protect the government's interests in the forfeitable Canal Street property. We recognize that the RICO forfeiture statute does not expressly provide for the imposition of interest. RICO's provisions, however, were intended to be liberally

construed to accomplish the statute's objectives. *See, e.g., Russello v. United States*, 464 U.S. 16, 26-28 (1983); *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). The forfeiture provision, in particular, constitutes one of the crucial weapons in the RICO arsenal and should be liberally construed to accomplish its purpose of attacking the economic power of illegal enterprises. *See Russello*, 464 U.S. at 26-28.

Employing this principle of liberal construction, we uphold the trial court's imposition of interest on the Canal Street property. If interest had not been imposed, the defendants effectively would have been allowed to pocket three years worth of interest earned on a real estate investment that, in large part, was acquired with the proceeds of an extortionate loan. Without the imposition of interest, the three year delay between the verdict and the final forfeiture judgment would have enabled the defendants to continue to realize investment earnings on the profits of their past racketeering activity. This cannot have been the intent of Congress when it drafted the expansive RICO forfeiture provision and urged its liberal construction. We uphold the trial court's imposition of interest as justified to protect the government's interest in forfeitable property and to prevent defendants' continued unlawful gain from that property. *But cf. Braxton v. United States*, 858 F.2d 650, 655 (11th Cir. 1988) (construing RICO's forfeiture provisions more literally).

VII. CONCLUSION

We affirm all of appellants' convictions and sentences.

We hold that two parts of the forfeiture order must be reversed. That part of the order forfeiting \$331,576 and \$41,025 in cash on a source of influence theory is reversed due to the trial court's failure to give a proportionality instruction. Fifty percent of this cash was properly forfeited as proceeds or profits of racketeering activity. We do not see how there could be a new trial on this issue without revisiting many of the other issues involved in this complex and lengthy case. We therefore order that fifty percent of the \$331,576 be returned to Gennaro, Donato and Francesco Angiulo, and that fifty percent of the \$41,025 be returned to Francesco Angiulo. That part of the order forfeiting Donato and Francesco Angiulo's interests in the Chrysler bonds and yacht is reversed for the reasons discussed in the body of the opinion. In all other respects, the forfeiture order is affirmed.

The case is remanded to the district court for effectuating the forfeiture order.

APPENDIX B

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

GENNARO J. ANGIULO

VITTORE NICOLO ANGIULO CR. NO. 83-235-N

ILLARIO M.A. ZANNINO

DONATO F. ANGIULO

SAMUEL S. GRANITO

FRANCESCO J. ANGIULO

MICHELE ANGIULO

MEMORANDUM AND ORDER REGARDING INDIVIDUAL MOTIONS OF DEFENDANT SAMUEL GRANITO

NELSON, D.J.

JULY 7, 1985

The defendant Samuel Granito, in addition to joining in the numerous joint motions filed by all defendants, has submitted a number of individual pretrial motions. Most of these overlap with the joint motions previously decided. The court will address them separately.

I. Motion to Dismiss

(Motion No. 82; Courtran Docket No. 352)

Apart from two arguments challenging the constitu-

tionality of the RICO statute and alleging a violation of the statute of limitations -- arguments which Granito failed to mention at oral argument and which the court summarily denies -- each of the many assertions contained in this motion has previously been addressed by the court. The contention that prior illegal electronic surveillance has impermissibly tainted the evidence in this case is DEFERRED until after trial. In all other respects, the motion is DENIED.

*II. Motion to Dismiss Indictment for
Insufficiency of Evidence*

(Motion No. 83; Courtran Docket No. 353)

As the court has more fully explained elsewhere, a defendant generally may not challenge an indictment on its face on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *See, e.g., United States v. Calandra*, 414 U.S. 338, 345 (1974); *Holt v. United States*, 218 U.S. 245 (1910). No extraordinary circumstances are here apparent to justify any deviation from this rule. The motion is accordingly DENIED.

III. Motion to Suppress

(Motion No. 87; Courtran Docket No. 357)

The court has elsewhere rejected the various challenges advanced in this motion to the legality of the Title III electronic surveillance. Apart from the assertion that prior illegal surveillance has impermissibly tainted the evidence in this case, which is DEFERRED until after trial, the motion is DENIED.

*IV. Motion for Reconsideration
of Discovery Motions*

(Motion No. 79; Courtran Docket No. 341)

This motion is moot except to the extent that the defendant requests a bill of particulars and exculpatory evidence. In connection with the former, he seeks to discover whatever evidence the government might possess of his having owned or conducted "an illegal gambling business involving poker card games" as alleged in the indictment. Yet such request boils down to a challenge to the sufficiency of the evidence underlying the indictment - a challenge the court has previously rejected. Moreover, the principal evidence against the defendant consists of the tape recordings of intercepted conversations, which are already in his possession. With respect to his request for exculpatory evidence, nothing in the defendant's sketchy representations warrants disturbing the Magistrate's determination on this issue. Accordingly, the motion is DENIED.

SO ORDERED.

/s/

DAVID S. NELSON

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOS. 86-1331

UNITED STATES, 89-1212

Appellee 89-1800

v.

GENNARO J. ANGIULO, DONATO F. ANGIULO,
SAMUEL S. GRANITO, FRANCESCO J. ANGIULO
and MICHELE A. ANGIULO,
Defendants/Appellants

Before

Breyer, *Circuit Judge*,
Bownes, *Senior Circuit Judge*
and Selya, *Circuit Judges [sic]*

ORDER ON PETITION OF
DEFENDANT/APPELLANT SAMUEL S. GRANITO
FOR REHEARING

Entered: March 26, 1990

The petition for rehearing is denied.

By the Court:

/s/

Francis P. Scigliano
Clerk

[cc: Messrs. Cardinale, Sheketoff, Sultan, Weinstein, Katz
and Marine]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NOS. 86-1331

UNITED STATES, 89-1212

Appellee 89-1800

v.

GENNARO J. ANGIULO, DONATO F. ANGIULO,
SAMUEL S. GRANITO, FRANCESCO J. ANGIULO
and MICHELE A. ANGIULO,
Defendants/Appellants

Before

Breyer, *Circuit Judge*,
Bownes, *Senior Circuit Judge*
and Selya, *Circuit Judges [sic]*

ORDER ON PETITION OF THE UNITED STATES FOR PANEL REHEARING

Entered: March 26, 1990

The government's petition for rehearing suggests that we laid down a broad rule stating that a retrial is barred when a judgment of forfeiture is reversed because of erroneous jury instructions and not because of the insufficiency of the evidence. This is a misreading of what we said. We stated in our opinion that under the special circumstances of this case, which took eight months to try

and raised a host of issues, "We do not see how there could be a new trial on this issue [forfeiture] without revisiting many of the other issues involved in this complex and lengthy case." That is all we said. The government's petition for rehearing states we did not have the authority to say this. The petition for rehearing also strongly suggests that regardless of the time and money involved that if the government wanted to, it could insist on a retrial of this case on the issue of forfeiture alone. While we very much doubt that the government has an absolute right to retry a single issue when such a retrial would involve a great deal of expenditure of time and money, and while we do not see how the double jeopardy clause is involved at all in this case, in light of the government's conclusion that it does not intend to retry the defendants here, the matter is moot. The petition for rehearing is denied.

By the Court:

/s/

Francis P. Scigliano

Clerk.

[cc: Messrs. Cardinale, Sheketoff, Sultan, Weinstein, Katz and Marine]

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 86-1331

**UNITED STATES,
Appellee,
v.**

**GENNARO J. ANGIULO, DONATO F. ANGIULO,
SAMUEL S. GRANITO, FRANCESCO J. ANGIULO
and MICHELE A. ANGIULO,
Defendants/Appellants.**

JUDGMENT

Entered: March 5, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The defendants' convictions and sentences are affirmed.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By: /s/

Daniel F. Loughry

Chief Deputy Clerk.

[cc: Messrs. Cardinale, Sheketoff, Sultan, Weinstein, Katz and Marine]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1212

UNITED STATES,
Appellee,
v.

GENNARO J. ANGIULO, DONATO F. ANGIULO,
and FRANCESCO J. ANGIULO,
Defendants/Appellants.

JUDGMENT

Entered: March 5, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: Fifty percent of the \$331,576 be returned to Gennaro, Donato and Francesco Angiulo and fifty percent of the \$41,025 be returned to Francesco Angiulo.

That part of the order forfeiting Donato and Francesco Angiulo's interests in the Chrysler bonds and yacht is reversed for the reasons discussed in the opinion issued this date and the cause is remanded to the district court for effectuating the forfeiture order.

In all other respects the forfeiture order is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By: /s/

Daniel F. Loughry

Chief Deputy Clerk.

[cc: Messrs. Cardinale, Sheketoff, Sultan, Weinstein, Katz
and Marine]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1800

UNITED STATES,
Appellee,
v.
GENNARO J. ANGIULO, ET AL.,
Defendants/Appellants.

JUDGMENT

Entered: March 5, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

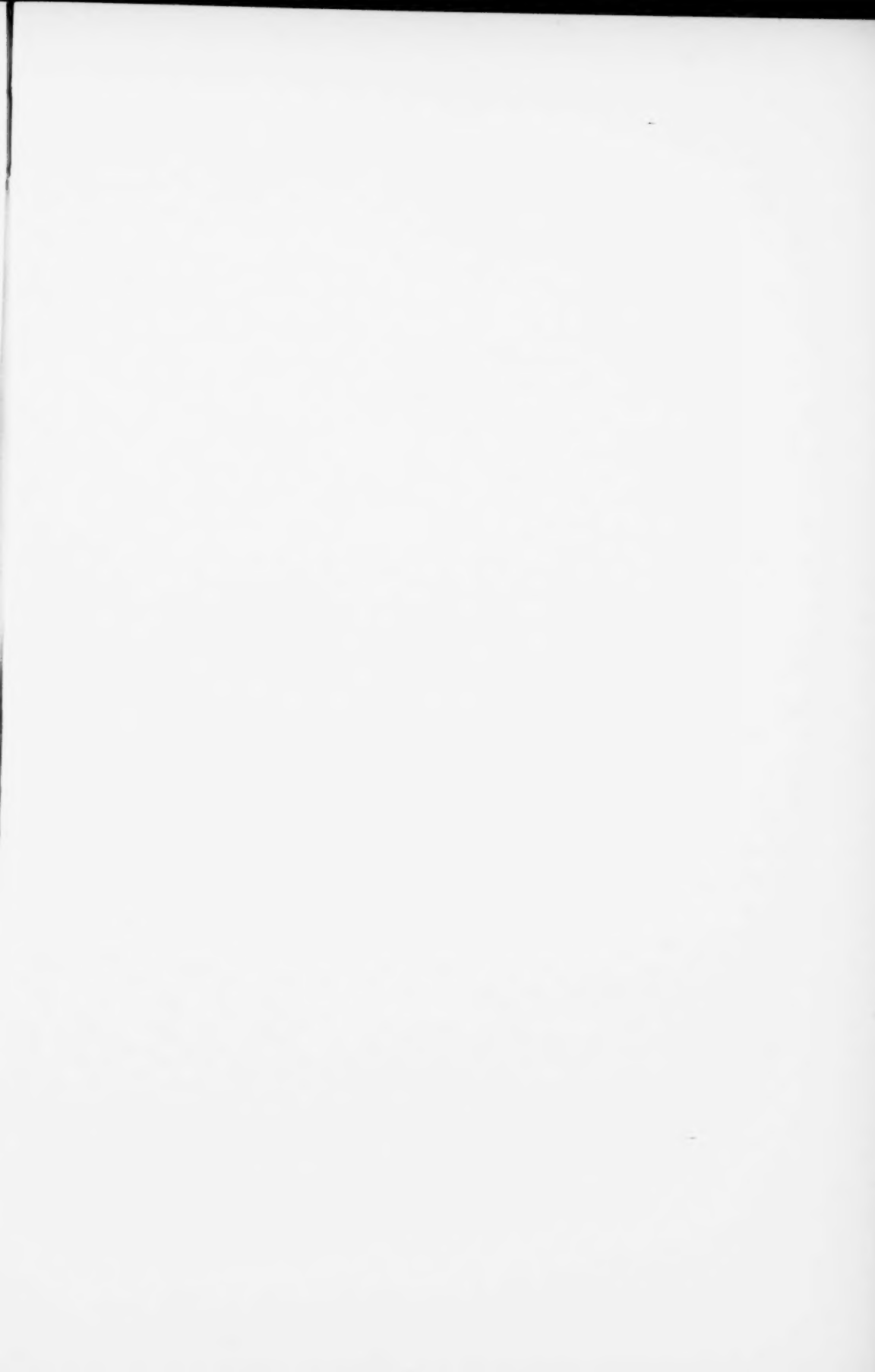
By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By: /s/_____

Daniel F. Loughry
Chief Deputy Clerk.

[cc: Messrs. Cardinale, Sheketoff, Sultan, Weinstein, Katz
and Marine]



③ ②
Nos. 90-10 and 90-46

Supreme Court, U.S.
FILED

AUG 24 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

SAMUEL S. GRANITO, PETITIONER

v.

UNITED STATES OF AMERICA

GENNARO ANGIULO, FRANCESCO ANGIULO, DONATO
ANGIULO, AND MICHELE ANGIULO, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR

Solicitor General

EDWARD S.G. DENNIS, JR.

Assistant Attorney General

JOEL M. GERSHOWITZ

Attorney

Department of Justice

Washington, D.C. 20530

(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner Granito's RICO convictions must be reversed because the court of appeals found that the evidence was insufficient to support one of the predicate acts of racketeering charged against him.
2. Whether the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.
3. Whether the district court erred in refusing to order immunity for a prospective defense witness.
4. Whether the district court erred in declining to give a requested jury instruction distinguishing between the extortionate extension of credit charged against petitioners Gennaro, Francesco, and Donato Angiulo in one count and the extortionate extension of credit charged against a severed co-defendant in another count.
5. Whether the district court erred in declining to instruct the jury that it could find one overall gambling business instead of the five separate gambling businesses charged in the indictment.
6. Whether the district court erred in declining to give the voice identification instruction requested by petitioners.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	23

TABLE OF AUTHORITIES

Cases:

<i>Brennan v. United States</i> , 867 F.2d 111 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989) . 8-9, 12	
<i>Callanan v. United States</i> , 881 F.2d 229 (6th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990)	11
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	13-14
<i>Government of the Virginia Islands v. Smith</i> , 615 F.2d 964 (3d Cir. 1980)	17
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	13
<i>H.J. Inc. v. Northwestern Bell Telephone Co.</i> , 109 S. Ct. 2893 (1989)	12, 13, 14, 15
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	14
<i>Mattheson v. King</i> , 751 F.2d 1432 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986)	16
<i>McCullough v. United States</i> , cert. denied, 484 U.S. 947 (1987)	12
<i>Parker v. Levy</i> , 417 U.S. 733 (1974)	13
<i>Pillsbury Co. v. Conboy</i> , 459 U.S. 248 (1983)	16

IV

Cases — Continued:

Page

<i>Sanabria v. United States</i> , 437 U.S. 54 (1978)	21
<i>Street v. New York</i> , 394 U.S. 576 (1969)	8
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)	7
<i>United States v. Aleman</i> , 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980)	13
<i>United States v. Alessio</i> , 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976)	17
<i>United States v. Anderson</i> , 809 F.2d 1281 (7th Cir. 1987)	9
<i>United States v. Brown</i> , 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979)	12
<i>United States v. Caldwell</i> , 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976)	17
<i>United States v. Campanale</i> , 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)	13
<i>United States v. Capozzi</i> , 883 F.2d 608 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990)	17
<i>United States v. Corona</i> , 885 F.2d 766 (11th Cir. 1989), cert. denied, 110 S. Ct. 1838 (1990)	10-11
<i>United States v. Duncan</i> , 850 F.2d 1104 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990)	21, 22, 23
<i>United States v. Durrani</i> , 835 F.2d 410 (2d Cir. 1987)	21
<i>United States v. Escobar De Bright</i> , 742 F.2d 1196 (9th Cir. 1984)	21

Cases — Continued:	Page
<i>United States v. Graham</i> , 548 F.2d 1302 (8th Cir. 1977)	17
<i>United States v. Hawes</i> , 529 F.2d 472 (5th Cir. 1976)	13
<i>United States v. Holzer</i> , 840 F.2d 1343 (7th Cir.), cert. denied, 109 S. Ct. 315 (1989) ...	11-12
<i>United States v. Hooks</i> , 833 F.2d 785 (7th Cir. 1988)	16, 18
<i>United States v. Huber</i> , 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980)	13
<i>United States v. Karas</i> , 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) ...	16
<i>United States v. Kragness</i> , 830 F.2d 842 (8th Cir. 1987), cert. denied, 109 S. Ct. 2086 (1989)	9, 12
<i>United States v. Lopez</i> , 803 F.2d 969 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) ...	9
<i>United States v. Lord</i> , 711 F.2d 887 (9th Cir. 1983)	18
<i>United States v. Lowell</i> , 649 F.2d 950 (3d Cir. 1981)	18
<i>United States v. Mandel</i> , 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989)	11
<i>United States v. Martino</i> , 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982)	13
<i>United States v. Morelli</i> , 643 F.2d 402 (6th Cir.), cert. denied, 453 U.S. 912 (1981)	13
<i>United States v. Morrison</i> , 535 F.2d 223 (3d Cir. 1976)	19
<i>United States v. Ochs</i> , 842 F.2d 515 (1st Cir. 1988)	8
<i>United States v. Peacock</i> , 654 F.2d 339 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983)	9

VI

Cases — Continued:

	Page
<i>United States v. Pennell</i> , 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)	16
<i>United States v. Pepe</i> , 747 F.2d 632 (11th Cir. 1984)	9
<i>United States v. Phillips</i> , 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982)	15
<i>United States v. Pinto</i> , 850 F.2d 927 (2d Cir.), cert. denied, 109 S. Ct. 174 (1988)	18
<i>United States v. Powell</i> , 423 U.S. 87 (1975) ..	13
<i>United States v. Pungitore</i> , No. 89-1371 (3d Cir. Aug. 1, 1990)	14
<i>United States v. Ruggiero</i> , 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984)	12, 13
<i>United States v. Swiderski</i> , 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979)	13
<i>United States v. Tarantino</i> , 846 F.2d 1346 (D.C. Cir.), cert. denied, 109 S. Ct. 174 (1988)	21
<i>United States v. Thevis</i> , 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) ...	16
<i>United States v. Tripp</i> , 782 F.2d 38 (6th Cir. 1986)	13
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	14
<i>United States v. Turkish</i> , 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)	16-17
<i>United States v. Uni Oil, Inc.</i> , 646 F.2d 946 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982)	13

VII

Cases — Continued:

	Page
<i>United States v. Walgren</i> , 885 F.2d 1417 (9th Cir. 1989)	11
<i>United States v. Weisman</i> , 624 F.2d 1118 (2d Cir. 1980)	15
<i>United States v. Westbrook</i> , 896 F.2d 330 (8th Cir. 1990)	21
<i>United States v. Zauber</i> , 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989) ..	11, 12
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	13
<i>Yates v. United States</i> , 354 U.S. 298 (1957) ...	7-8
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	8

Constitution and statutes:

U.S. Const.:

Amend. I	13
Amend. V	15, 18

Racketeer Influenced and Corrupt Act:

18 U.S.C. 1955	2, 21
18 U.S.C. 1961	15
18 U.S.C. 1961(5)	9
18 U.S.C. 1962(c)	2
18 U.S.C. 1962(d)	2
18 U.S.C. 6001 <i>et seq.</i>	16
18 U.S.C. 371	2
18 U.S.C. 892(a)	2
18 U.S.C. 894(a)	2
18 U.S.C. 1503	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-10

SAMUEL S. GRANITO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 90-46

GENNARO ANGIULO, FRANCESCO ANGIULO, DONATO
ANGIULO, AND MICHELE ANGIULO, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-109a) is reported at 897 F.2d 1169.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1990, Petitions for rehearing were denied on March 26, 1990. The petitions for a writ of certiorari were filed on June 25, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Gennaro Angiulo was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); four counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Counts 3, 4, 5, 7); two counts of conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. 892(a) (Counts 12 and 13); one count each of conspiring to collect and collecting an extortionate extension of credit, in violation of 18 U.S.C. 894(a) (Counts 14 and 15, respectively); one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 18); and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count 19). Petitioner Francesco Angiulo was convicted on Counts 1 through 5, 7, and 12 through 14; petitioner Donato Angiulo was convicted on Counts 1, 2, 3, and 12; petitioner Granito was convicted on Counts 1, 2, and 4; and petitioner Michele Angiulo was convicted on Count 3.

Gennaro Angiulo was sentenced to a total of 45 years' imprisonment and \$120,000 in fines; Francesco Angiulo was sentenced to 25 years' imprisonment and \$60,000 in fines; Donato Angiulo was sentenced to 20 years' imprisonment and \$40,000 in fines; Granito was sentenced to 20 years' imprisonment and \$35,000 in fines; and Michele Angiulo was sentenced to three years' imprisonment and a fine of \$5,000. The district court also ordered the forfeiture of various assets. The court of appeals reversed two parts of the forfeiture order but affirmed in all other respects. Pet. App. 1a-109a.

1. The evidence at trial showed that all five petitioners were members of the Patriarca Family of La Cosa Nostra.

Gennaro Angiulo was the underboss of the organization, in charge of its day-to-day operations. Immediately beneath him in the command hierarchy were Samuel Granito and Donato Angiulo, who were "Capo Regimes" (captains). Beneath the Capo Regimes, the organization consisted of soldiers and then of associates. Francesco Angiulo was a soldier and also served as the accountant for the organization's gambling and loansharking businesses. Michele Angiulo was an associate. Pet. App. 3a-4a.

In various combinations, petitioner's participated in four illegal gambling operations. The first involved the operation by Gennaro and Francesco Angiulo of a series of "Las Vegas Nights" gambling events from approximately late 1978 to mid-1981. The events were a type of bazaar, ostensibly operated to benefit nonprofit, charitable organizations. In fact, however, the proceeds were not given to charitable organizations, but were kept by their La Cosa Nostra operators. Pet. App. 4a.

The second gambling business involved the operation, during 1980 and 1981, of twice-weekly barbooth games at the Demosthenes Democratic Social Club in Lowell, Massachusetts. Barbooth is a dice game in which, typically, 12 or more players place bets on whether the shooter of the dice will roll a winning or losing combination of numbers. The house takes a percentage of the amount bet. Gennaro Angiulo was the overseer of the operation, and Francesco Angiulo was the accountant. Pet. App. 5a.

The third gambling business was an extensive, illegal numbers-betting operation in the Boston area. Approximately 180 people were involved in the operation, including agents who collected the bets, "sub-books" who controlled the agents and paid the winning bettors, and office managers who supervised the day-to-day operation of the business and settled accounts with the sub-books. Gen-

naro Angiulo was the principal owner and overall boss of the operation. Francesco Angiulo was the day-to-day supervisor. Donato Angiulo controlled a number of sub-book operations and was responsible for collecting money. Michele Angiulo stood in for Francesco and also assisted in controlling several of the sub-book operations. Pet. App. 5a.

The final gambling business involved high-stakes poker games in which Gennaro Angiulo and Granito had a financial interest. Gennaro Angiulo was the overall boss of the operation, and Francesco Angiulo served as the accountant. Pet. App. 6a.

In addition to their gambling operations, Gennaro, Donato, and Francesco Angiulo engaged in loansharking. For example, in 1981 Donald Smoot, a regular player in the poker games, owed Donato Angiulo \$14,000 at an interest rate of two and a half percent per week. Joseph Palladino owed the Angiulos \$200,000, paid interest at the rate of one percent per week, and eventually satisfied the debt by transferring real estate to the Angiulos. Pet. App. 6a-7a.

Petitioners also engaged in a series of conspiracies to obstruct justice and commit murder. During the 1950s and 1960s, Edward, William, and Walter Bennett were loansharks and bookmakers who came into conflict with Gennaro Angiulo and codefendant Ilario Zannino. In January 1967, Edward Bennett disappeared; in April 1967, Walter Bennett likewise disappeared; and in December 1967, William Bennett was shot to death. In an intercepted conversation in 1981, Gennaro Angiulo and Zannino recounted how Zannino, with the help of an accomplice, killed the Bennetts at Gennaro's direction. Gov't C.A. Br. 28-29.

In 1976, Gennaro Angiulo had his associates kill Joseph Barboza, who had testified against Gennaro and other members of his organization in several prosecutions. Gov't

C.A. Br. 29-30. In early 1981, Gennaro conspired with others to kill Walter LaFreniere in order to prevent him from testifying before a federal grand jury about the Angiulo organization. Also in early 1981, Gennaro Angiulo and Granito engaged with others in a conspiracy to kill Angelo Patrizzi, who they believed was planning to kill two members of the Patriarca Family as revenge for the 1978 murder of Patrizzi's half-brother. In June 1981, Patrizzi's decomposed body was found in the trunk of a stolen car. Pet. App. 7a-8a.

2. The court of appeals affirmed the convictions. Petitioners contended, first, that their RICO convictions had to be reversed because the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague. In rejecting that claim, the court concluded that, whatever doubts there may be about the "precise reach of the statute in marginal fact situations not currently before [the court]," there could be no doubt on the part of a person of ordinary intelligence that petitioners' conduct was proscribed, because "the murder conspiracies and the gambling and loansharking operations for which the defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO." Pet. App. 12a-13a. The court also held that the predicate acts charged against petitioner Granito, all of which were carried out to further the aims of the same RICO enterprise (the Patriarca Family), clearly constituted a "pattern" within the meaning of the RICO statute. *Id.* at 15a.

Second, the court rejected the Angiulos' contention that the district court erred in refusing to order immunity for prospective defense witness Joseph Palladino. The court expressed "substantial reservations" about the notion that judges have inherent power to grant defense-witness immunity. In any event, however, the court concluded that a

grant of immunity to Palladino would not have been appropriate because the government had "significant" reasons for withholding immunity: to protect possible future federal and state prosecutions of Palladino for engaging in organized criminal activities. Pet. App. 43a. The court also found no government misconduct with respect to Palladino of a sort that might warrant a court order requiring the government to grant Palladino statutory immunity. *Id.* at 43a-47a.

Third, although the court found the evidence insufficient to support one of the predicate acts of racketeering charged against Granito (being an accessory to the Patrizzi murder), the court upheld Granito's RICO convictions on the ground that the jury necessarily found him guilty of conspiring to kill Patrizzi and participating in the poker game operation, the other two predicate acts alleged against him. Pet. App. 54a-65a.

Next, the court upheld the district court's refusal to instruct the jury that the testimony of an FBI agent, who had identified petitioners' voices in tape-recorded conversations, must be "received with caution and scrutinized with care." The court of appeals explained that the general jury instructions, when considered in the context of the charge as a whole, adequately covered the issues raised by the requested voice-identification instruction, and that the district court's failure to give the instruction did not impair petitioners' ability to present their voice-identification defense. Pet. App. 80a-81a.

Fifth, petitioners contended that the district court should have instructed the jury that it could find that petitioners' various gambling operations constituted only a single overall gambling business, rather than five separate gambling businesses, as charged in the indictment. The court of appeals found "little or no evidentiary grounds to warrant instructing the jury on the 'one business only' theory." Pet. App. 84a.

Finally, the court rejected the Angiulos' contention that the jury instruction on Count 12 (which charged Gennaro, Francesco, and Donato Angiulo with making an extortionate loan of \$14,000 to Donald Smoot), failed adequately to differentiate the Angiulos' loan from a distinct \$14,000 loan to Smoot made by Zannino (which was initially charged in Count 11 and later deleted from the indictment when Zannino was severed from the trial). The court concluded that the instructions, as given, were "sufficiently clear to eliminate any likelihood that the jury would confuse the Zannino loan (count 11) with the Angiulo loan (count 12)." Pet. App. 89a.¹

ARGUMENT

1. Petitioner Granito challenges (Pet. 16-26) the court of appeals' affirmance of his RICO convictions after the court found the evidence insufficient to support one of the predicate acts charged against him. Contending that the jury may have improperly relied on the invalid predicate act in convicting him, petitioner claims that this case falls within the rule that when the jury is instructed that it may convict on one of several grounds, and one of those grounds is later determined to be insufficient, the conviction must be reversed if the reviewing court is not certain that the jury's verdict rested on a valid ground. See *Stromberg v. California*, 283 U.S. 359, 367-370 (1931) (reversing when "so far as the record discloses" the conviction may have rested on an invalid ground); *Yates v.*

¹ Petitioners also unsuccessfully challenged the impartiality of the jury, Pet. App. 15a-32a, a variety of evidentiary and procedural rulings, *id.* at 32a-39a, 47a-53a, the sufficiency of the evidence on certain counts, *id.* at 65a-67a, and certain other aspects of the jury charge, *id.* at 67a-77a, 85a-87a, 89a-91a. Petitioners do not renew those claims in this Court.

United States, 354 U.S. 298, 312 (1957); *Street v. New York*, 394 U.S. 576, 585-588 (1969); see generally *Zant v. Stephens*, 462 U.S. 862, 880-884 (1983).

The court of appeals acknowledged the general rule on which petitioner relies. But the court correctly concluded that that rule is not controlling when "uncertainty as to the ground upon which the jury relied can be eliminated," such as "where a verdict based on any ground would mean that the jury found every element necessary to support a conviction on the sufficient ground." Pet. App. 63a-64a, quoting *United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). Applying those principles, the court concluded that the jury here necessarily found that petitioner committed the two predicate acts charged in the indictment that were sufficiently supported by the evidence.²

Granito was charged with three predicate acts under RICO: gambling; being an accessory to the Patrizzi murder; and conspiring to murder Patrizzi. The predicate act of gambling was also charged as a separate substantive crime. The court first noted that the jury's conviction of Granito on the gambling count removed all doubt that the jury also found him guilty on the corresponding predicate act of gambling. Pet. App. 62a. See *Brennan v. United States*, 867 F.2d 111, 114 (2d Cir.) (guilty verdicts on separately charged crimes paralleling the RICO predicate acts

² Although the court of appeals did not have to reach the issue, there is reason to doubt that the *Street-Stromberg-Yates* analysis applies in a case such as this, where the evidence as to one of the predicate acts is factually insufficient but the charge is not legally defective. In these circumstances, it is reasonable to assume that the jury acted rationally in convicting on the basis of the predicate acts that were supported by the evidence and not on the basis of the predicate act that was not sufficiently proved. In that respect, this case is quite different from *Street*, *Stromberg*, and *Yates*, where the jury could rationally have relied on an impermissible theory, not having any basis for knowing that it was legally defective.

"operated like special verdicts" showing the jury's finding of guilt on the predicate acts), cert. denied, 109 S. Ct. 1750 (1989); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987), cert. denied, 109 S. Ct. 2086 (1989); *United States v. Anderson*, 809 F.2d 1281, 1284-1285 (7th Cir. 1987); *United States v. Lopez*, 803 F.2d 969, 976-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States v. Pepe*, 747 F.2d 632, 688 (11th Cir. 1984); *United States v. Peacock*, 654 F.2d 339, 348 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

The court also reasoned that because a RICO "pattern" requires "at least two acts of racketeering activity," 18 U.S.C. 1961(5), the jury also must have found Granito guilty of conspiring to murder Patrizzi, being an accessory to his murder, or both. Pet. App. 62a. If the jury found Granito guilty of conspiracy, the court observed, his RICO convictions would of course be valid; the evidence sufficiently established conspiracy. But the court rejected Granito's surmise that "the jury may have found him guilty on accessory, but not on conspiracy." *Id.* at 64a. Although the court found the evidence insufficient in one respect to support the accessory charge,³ the court ex-

³ There was no doubt about the sufficiency of the evidence to establish Granito's role in the murder. In a tape-recorded conversation, Granito described a murder attempt on Patrizzi, stating: "We had [Patrizzi] ready last Friday. Oh, we had him Friday cause he said 'c'mon we'll go for coffee.' We had a place. We're gonna take him in a house and strangle him" Gov't C.A. Br. 32; see also *id.* at 33 (describing Granito's agreement to procure a telephone number that could be used to identify Patrizzi's whereabouts in order to murder him). The source of doubt with respect to the accessory charge was whether Frederick Simone was a principal in that murder. Pet. App. 55a-60a. The court recited ample evidence that Granito planned the murder and engaged in attempts to commit it, *id.* at 58a, but concluded that "[w]hether Simone participated in the actual murder is wholly unclear from the evidence," *id.* at 60a.

plained that if the jurors found Granito guilty of being an accessory to Patrizzi's murder, they necessarily must have found him guilty on the charge of conspiring to kill Patrizzi, thus supplying the second valid predicate act.

If the jury convicted Granito as an accessory, by finding that [Frederick] Simone was a principal in the Patrizzi murder and that Granito had incited, procured, counseled, hired and commanded Simone to commit the murder, they must necessarily have accepted the government's interpretation of the pertinent tape-recorded conversations involving Simone, Granito, Gennaro Angiulo, and Zannino. These same conversations, and virtually the same government interpretation, were at the heart of the conspiracy charge against Granito, which alleged that Granito had conspired with Zannino, Simone, and Gennaro Angiulo to kill Patrizzi.

Pet. App. 64a-65a. The court thus concluded that "[b]ecause the facts and the elements underlying the two charges were so intertwined, if the jury found Granito guilty as an accessory, they must also have found him guilty of conspiracy." ⁴ *Id.* at 65a.

The court of appeals' affirmance of Granito's RICO convictions, after its determination that the jury necessarily found the requisite predicate acts, is fully consistent with the analysis employed in similar settings by other courts of appeals. See *United States v. Corona*, 885 F.2d

⁴ Granito argues (Pet. 24) that it would not necessarily be inconsistent, in a particular case, for a jury to convict a defendant of being an accessory to a crime and to acquit him of conspiring to commit the crime. But the court of appeals understood the different elements of the two crimes, Pet. App. 62a n.16; it simply concluded, on the facts of this case, that a rational jury could not have found Granito guilty of being an accessory without finding every element required to convict him of conspiracy.

766, 775 (11th Cir. 1989) (allegations on invalid mail fraud counts and valid Travel Act counts "were so intertwined that jury could not reasonably have found that [the defendant] performed the mail fraud but not the Travel Act conduct"), cert. denied, 110 S. Ct. 1838 (1990); *Callanan v. United States*, 881 F.2d 229, 234-235 (6th Cir. 1989) (co-defendant's conviction on RICO charges based on bribery established that the jury found that defendant committed valid bribery predicates; therefore, invalid mail fraud predicate acts did not require reversal), cert. denied, 110 S. Ct. 1816 (1990); *United States v. Zauber*, 857 F.2d 137, 151-154 (3d Cir. 1988) (instruction required jury to find kickbacks; hence, submission of invalid predicate acts of mail fraud did not require reversal of RICO charge), cert. denied, 109 S. Ct. 1340 (1989).

Contrary to Granito's contention (Pet. 18), there is no conflict among the courts of appeals over the proper disposition of RICO convictions when one predicate act is found invalid. In the cases cited by Granito, the courts reversed RICO convictions only after finding that it was unclear whether the jury had found two valid predicate acts. The court of appeals noted those holdings, Pet. App. 63a, but properly found them inapplicable in a case like this one. See *United States v. Walgren*, 885 F.2d 1417, 1426 (9th Cir. 1989) (court could not conclude that mail fraud conviction on "intangible rights" theory constituted a jury finding that defendant was guilty of a state bribery offense not charged in the indictment); *United States v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988) (RICO conviction vacated because "we may not know whether the [intangible rights] mail fraud or the bribery charges * * *, or both, were considered by the jury"), cert. denied, 109 S. Ct. 3190 (1989); *United States v. Holzer*, 840 F.2d 1343, 1350-1352 (7th Cir.) (recognizing that a RICO conviction must be upheld even when one predicate act is invalid if a

rational jury necessarily found sufficient predicate acts, but finding that principle inapplicable on a particular record), cert. denied, 109 S. Ct. 315 (1988); *United States v. Kragness*, 830 F.2d at 861 ("we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed"); *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.) (invalid predicate act had no relationship to other predicate acts charged), cert. denied, 469 U.S. 831 (1984).⁵

2. Petitioners contend (90-10 Pet. 26-29; 90-46 Pet. 49-55) that the "pattern of racketeering activity" element of a RICO offense is unconstitutionally vague. They rely on the concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2906-2909 (1989), in which Justice Scalia, joined by three other Justices, ex-

⁵ Granito also relies (Pet. 18) on *United States v. Brown*, 583 F.2d 659, 669-670 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), in which the court, pursuant to a government concession, reversed the defendant's RICO conviction following the invalidation of two predicate mail fraud violations. Based on a conflict between *Brown* and cases from other circuits, Justices White and Brennan would have granted certiorari in *McCullough v. United States*, cert. denied, 484 U.S. 947 (1987). But the Third Circuit subsequently narrowed *Brown*, explaining that the RICO conviction there had to be reversed because "it was impossible to determine whether the jury had relied on invalid predicate acts." *United States v. Zauber*, 857 F.2d at 154. In *Zauber* itself, the Third Circuit joined other courts of appeals in holding that a reviewing court must consider whether the record discloses that the jury necessarily relied on a valid ground for its verdict. In light of *Zauber*, the conflict noted in *McCullough* has disappeared. See *Brennan v. United States*, 867 F.2d at 116 (discussing *Brown* and *Zauber* and concluding that "there appears to be no conflict with respect to" the disposition of RICO convictions where one predicate is found invalid); *United States v. Holzer*, 840 F.2d at 1351 (finding no conflict because of the court's prediction that the Third Circuit would adopt the rule later embraced in *Zauber*).

pressed doubts about whether the RICO "pattern" element could withstand a constitutional vagueness challenge.⁶

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States v. Powell*, 423 U.S. 87, 92 (1975); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Connally v. General Construction Co.*,

⁶ In *H.J. Inc.*, this Court clarified that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." 109 S. Ct. at 2900. Prior to *H.J. Inc.*, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See *United States v. Tripp*, 782 F.2d 38, 41-42 (6th Cir. 1986); *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982); *United States v. Uni Oil, Inc.*, 646 F.2d 934, 949-953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); *United States v. Morelli*, 643 F.2d 402, 412 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States v. Hawes*, 529 F.2d 472, 478-479 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

269 U.S. 385, 391 (1926). In this case, the court of appeals correctly concluded that petitioners "have not even come close to making this showing[.]" Pet. App. 13a.⁷

Congress drafted the RICO statute to cover a wide range of criminal activity, but "[o]rganized crime was without a doubt Congress' major target[.]" *H.J. Inc.*, 109 S. Ct. at 2904. See also *United States v. Turkette*, 452 U.S. 576, 588-593 (1981). Given RICO's central purpose of combatting organized crime, persons of reasonable intelligence have ample notice that the statute reaches the commission of repeated criminal acts—such as murder, gambling, and loansharking—that are aimed at furthering the goals of a La Cosa Nostra family. As the court of appeals concluded, "[a] person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of RICO's pattern of racketeering activity." Pet. App. 13a. In rejecting a similar vagueness challenge, the Third Circuit recently reached the same conclusion, stating: "[T]he application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case." *United States v. Pungitore*, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. 27.

⁷ The Court has noted "the more important aspect of the vagueness doctrine 'is not actual notice, but * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Petitioners, who are associated with precisely the type of organized crime family that RICO was principally designed to attack, do not suggest that the RICO statute failed to give the government sufficient guidelines to use in determining whether to prosecute them for racketeering violations.

Petitioner Donato Angiulo and Granito further claim (90-46 Pet. 54; 90-10 Pet. 28-29) that they lacked fair notice that their varied criminal acts satisfied the "relatedness" aspect of RICO's pattern requirement. See *H.J. Inc.*, 109 S. Ct. at 2900-2901. That contention is without merit. In enacting RICO, Congress recognized that organized criminals engage in "diversified" activities such as "syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation." 18 U.S.C. 1961 note (Congressional Statement of Findings and Purpose). Accordingly, courts have uniformly held that the requisite relatedness of predicate acts is established when each act benefits or furthers the goals of the same criminal enterprise. See, e.g., *United States v. Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir. 1980) ("the enterprise itself supplies a significant unifying link between the various predicate acts"). Since the predicate acts committed by petitioners advanced the cause of a single organized crime family, there can be no serious contention that petitioners lacked notice that they were subject to RICO liability for their conduct.

3. The Angiulos next contend (Pet. 33-35) that the district court erred in denying a motion to grant immunity for a prospective defense witness, Joseph Palladino.⁸ Peti-

⁸ At trial, the defense stated that it wished to call Palladino, one of the Angiulos' loansharking victims, to testify that he was not a loansharking victim at all, but rather a party to a legitimate business transaction with the Angiulos. After unsuccessfully moving to restrict the government's cross-examination of Palladino to his alleged status as a loansharking victim, the defense moved for immunity for Palladino, claiming that, absent immunity, Palladino would assert his Fifth Amendment privilege and refuse to testify. The district court denied the motion, and Palladino did not testify. Pet. App. 39a.

titioners urge that immunity should have been granted on one of two theories: first the district court should have granted Palladino immunity because his testimony was essential for an effective defense; second, the district court should have ordered the government to grant statutory immunity to Palladino to prevent the government from deliberately distorting the fact-finding process. The court of appeals properly rejected both arguments. Because the court assumed the validity of the underlying theories but found their requirements not satisfied in this case, the court's decision does not conflict with any decision of any other court of appeals.

a. In our view, the district court did not have authority to immunize Palladino absent a request from the government. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to seek immunity in the Executive Branch, not the Judiciary. In discussing the immunity statutes, this Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983). Strong separation-of-powers concerns counsel against the assertion of judicial power to make immunity decisions for the government. Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.⁹

⁹ See, e.g., *United States v. Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson v. King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States v. Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States v. Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States v. Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States v. Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077

The Third Circuit alone has held that immunity may be granted on the court's initiative, where it is necessary to protect the defendant's efforts to mount his defense. That court has narrowly limited the scope of that rule, however:

[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

Government of the Virgin Islands v. Smith, 615 F.2d 964, 972 (1980). Even assuming that Palladino's testimony could be characterized as essential and exculpatory, the defense was not entitled to immunity for Palladino under the *Smith* approach. As the court of appeals explained, "[u]nlike in *Smith*, the government here *has* presented a number of significant reasons for withholding immunity." Pet. App. 43a. The government indicated that granting Palladino immunity would impede possible future prosecutions of Palladino for involvement in organized crime activities, for tax violations, and for violations of state law. *Ibid*. Indeed, the government advised the court that at that very moment, Palladino was the subject of an IRS investigation arising from business and real estate transactions related to the charges in that case. Gov't C.A. Br. 101. The court of appeals correctly concluded that "[t]hese reasons certainly are adequate to constitute a strong governmental interest in withholding immunity." Pet. App. 43a. There is no reason to believe the Third Circuit

(1981); *United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States v. Caldwell*, 543 F.2d 1333, 1356 n. 115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States v. Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976). See also *United States v. Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990).

would have decided the question differently. See *United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (upholding denial of defense witness immunity in part because government "may yet" prosecute witness for whom immunity was sought).

b. Nor was statutory immunity for Palladino required in order to prevent deliberate distortion of the fact-finding process. The courts that have addressed that theory have held that district courts may compel the government to immunize defense witnesses in only two circumstances: where government intimidation provokes a defense witness into invoking his Fifth Amendment privilege, thereby withholding testimony that otherwise would have been available to the defense, or where the government withholds immunity from a defense witness for the purpose of keeping exculpatory evidence from the jury. See, e.g., *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States v. Hooks*, 848 F.2d 785, 799 (7th Cir. 1988); *United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983). In the court of appeals, petitioners argued that the government intimidated Palladino by (1) informing the court that it thought Palladino would lie if he testified; (2) transmitting pertinent information on Palladino to the IRS; (3) reciting to the court the criminal activities of which it suspected Palladino; and (4) notifying Palladino, through the IRS, that he was under investigation for possible tax violations. As the court of appeals correctly concluded, however, "[n]one of this conduct is sufficient to warrant a finding of witness intimidation by the prosecution." Pet. App. 45a.

First, the government's statements that it thought Palladino would testify falsely and its enumeration of his suspected crimes were not calculated to intimidate him; those statements were directed not to Palladino but to the court. The government properly made those statements in

order to explain why it had declined to grant Palladino statutory immunity. Second, there was nothing improper about the prosecution's transmission of information to the IRS; investigative arms of the government frequently share information in which they have a mutual interest. Finally, the prosecution did not suggest to the IRS that it contact Palladino, nor does the record show the prosecution was even aware the IRS would do so. As the court of appeals observed, the defense "ha[s] not pointed to any direct communication between the prosecution and Palladino," or "established the requisite nexus between the government's conduct and Palladino's decision not to testify." Pet. App. 46a. Compare *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (intimidation found where prosecution repeatedly warned prospective witness that she was liable to prosecution on drug charges, that if she testified her testimony could be used against her, and that federal perjury charges could be brought if she lied).

Nor is there any basis for believing that the prosecution declined to grant Palladino immunity for the purpose of keeping exculpatory testimony from the jury. As previously discussed, the government provided valid reasons for its objection to immunizing Palladino, including his suspected involvement in other criminal activities and the government's desire not to hinder possible state and federal prosecutions. The court of appeals explained that "[t]hese reasons clearly show that the government's conduct was motivated by something other than the sole desire to keep Palladino's exculpatory testimony from the jury." Pet. App. 47a.

4. Petitioners contend (90-46 Pet. 36-43) that the district court erred in failing to give a jury instruction distinguishing between two extortionate loans that were made to the same victim. Count 11 of the initial indictment charged co-defendant Zannino with making an extortionate \$14,000

loan to Donald Smoot. Count 12 of the indictment charged petitioners Gennaro, Francesco, and Donato Angiulo with making a separate extortionate loan to Smoot, also in the amount of \$14,000. Shortly after opening statements, Zannino's trial was severed from that of petitioners, and Count 11 was deleted from the indictment. Petitioners' defense to Count 12 was that only one \$14,000 loan was made to Smoot, and that it was made by Zannino, acting alone. Petitioners argue that the district court committed reversible error by refusing to give a requested jury instruction informing the jury that Count 12 did not relate to the Zannino loan. Pet. App. 88a.

As the court of appeals correctly concluded, "[a]lthough the court did not give the precise instruction requested by [petitioners], the careful instructions that were given more than adequately covered the situation." Pet. App. 89a. The district court explicitly instructed the jury that Counts 7 through 11 had been deleted from the indictment as a result of Zannino's severance. Furthermore, the court read Count 12 to the jury and reviewed each of the elements of the charge. In so doing, the court explicitly named Gennaro, Francesco, and Donato Angiulo as the defendants who were charged with the loan. Finally, the redacted indictment together with written copies of the entire charge were provided to the jury. *Ibid.* In light of these circumstances—and the fact that Smoot's testimony and the opening and closing arguments clearly reflected the separateness of the two loans (see Gov't C.A. Br. 103-104)—petitioners' proposed instruction was not necessary to prevent jury confusion about the subject matter of Count 12.

5. The Angiulos contend (Pet. 43-46) that the district court committed reversible error in failing to give an instruction permitting the jury to decide how many gambling businesses petitioners operated. The indictment charged, both as predicate acts of racketeering in the

RICO counts and as separate substantive offenses, that petitioners engaged in five distinct gambling businesses. Petitioners asked for an instruction that the jury could find that these operations formed only one overall gambling business.

The district court properly declined to give the "one business only" instruction, because the evidence did not support it. A trial court is required to give an instruction on the theory of the defense "only if the evidence provides some foundation for it." *United States v. Durrani*, 835 F.2d 410, 419-420 (2d Cir. 1987); *United States v. Tarrantino*, 846 F.2d 1384, 1400 (D.C. Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States v. Westbrook*, 896 F.2d 330, 337 (8th Cir. 1990). The government introduced evidence at trial showing that petitioners' gambling businesses, each of which involved a different type of gambling, were conducted over different time periods, held in different locations, and operated by different managers and personnel. Pet. App. 84a. Petitioners point to nothing in the record indicating that their gambling operations constituted one business. Indeed, as the court of appeals noted, the "paucity of * * * references [to the theory at trial] undercuts any argument that the issue was of such importance that the failure specifically to instruct on it seriously impaired a given defense." *Ibid.*¹⁰

¹⁰ Contrary to petitioners' apparent contention (90-46 Pet. 43-44) nothing in *Sanabria v. United States*, 437 U.S. 54 (1978), suggests that a defendant is always entitled to a "one business only" instruction. The Court in *Sanabria* noted only that under 18 U.S.C. 1955, participation in a single gambling business is but a single offense, 437 U.S. at 70-71; the opinion does not require that the issue be put to the jury where the uncontradicted evidence shows multiple gambling businesses. Nor are petitioners correct in contending (90-46 Pet. 46) that the result here conflicts with the decisions in *United States v. Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984), and *United States v. Duncan*, 850

6. Finally, the Angiulos contend (Pet. 47-49) that the district court erred in refusing to give specific instructions regarding voice-identification testimony. The government's evidence at trial consisted in considerable part of tape-recorded conversations obtained through court-authorized electronic surveillance. An FBI agent testified about how the recordings were acquired, and he identified petitioners' voices on the tapes. At the close of the evidence, the defense asked the district court to instruct the jury that the agent's testimony about the voice identifications must be "received with caution and scrutinized with care," and that "[t]he government's burden of proof extends to every element of each crime charged, including the burden of proving beyond a reasonable doubt the identity of an alleged perpetrator of an offense." Pet. App. 78a.

Although the district court declined to give the specific instruction requested by petitioners, the requested instruction was substantially covered by the court's charge. The court gave a general instruction on witness credibility, informing the jury that it must determine the credibility of each witness's testimony. The court also instructed the jury that the written transcripts of the tape recordings introduced by the government had no independent evidentiary value and were to be used only to help the jury discern the words on the tapes. Finally, the court repeatedly emphasized in its charge the government's burden of proof as to each element of the crimes charged. As the court of appeals observed, "[t]hese instructions put the jurors on notice that they were to listen to the tapes themselves and reach their own determinations, and not blindly base their

F.2d 1104, 1117 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990). Both of those cases make clear that a theory-of-defense instruction need be given only where the asserted defense has "some foundation" (*Escobar De Bright*, 742 F.2d at 1201) or "finds some support" (*Duncan*, 850 F.2d at 1117) in the evidence; neither approach would have required petitioners' instruction on this record.

verdict on any interpretation of the tapes by government witnesses or on any government-prepared transcripts." Pet. App. 80a. Moreover, in light of the prominence given by the defense to the voice-identification issue, the court of appeals correctly concluded that "a jury receiving the court's general instructions on witness credibility, the government's burden of proof, and the limited purpose of the transcripts would understand that [the agent's] testimony was to be scrutinized with care." *Id.* at 81a.¹¹

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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¹¹ The Angiulos cite *United States v. Duncan*, 850 F.2d at 1117-1118, for the proposition that a closing argument by defense counsel is no substitute for a jury instruction on the theory of the defense. Pet. 48-49. But the court of appeals did not hold that the defense closing argument made up for an inadequate jury charge; rather, it held that the jury instructions given by the court were sufficient to cover the essential points raised by petitioners' request, especially when viewed in light of the whole trial, including the closing arguments.